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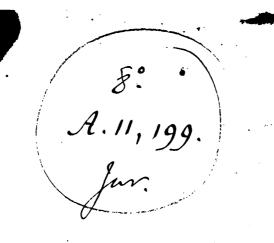
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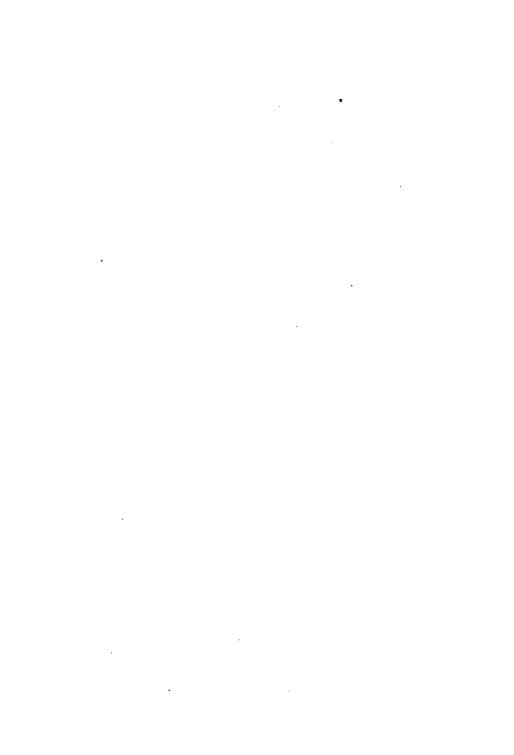


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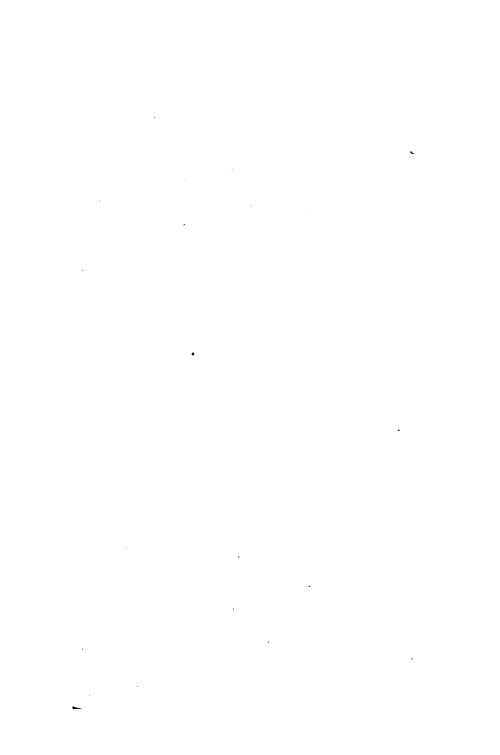




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PRACTICAL TREATISE

ON THE

LAW OF DISTRESS

For Rent,

AND

Of Things Damage-Feasant:

WITH

FORMS;

AND

AN APPENDIX OF STATUTES.

въ

EDWARD BULLEN, Esq.

OF THE MIDDLE TEMPLE, SPECIAL PLEADER.

LONDON:
SHAW & SONS, FETTER LANE.
1842.



PREFACE.

THIRTY years have now elapsed since the publication of any new work on the Law of Distress, and thirteen years since the publication of even a new edition of any existing work on the subject. This may perhaps be a sufficient excuse, if any be necessary, for the appearance of the present treatise.

It was begun with the assistance of the late Mr. Joseph Chitty, Junr.; and was intended to have been the joint production of that gentleman and of the present author,—when Mr. Chitty's death threw the completion of the work entirely on his fellow-labourer. Much time and care have been devoted to the task; but, under the above circumstances, the work is presented to the profession and the public with very sincere diffidence, and, it is hoped, with some claim to indulgent consideration.

It could not be thought otherwise than advisable for a writer on the Law of Distress at the present day to avail himself of the valuable

labours of the late Mr. Bradby on the subject: consequently, recourse has been had to his excellent work frequently and freely in the following treatise; and the assistance which the author has derived from that source is gratefully acknowledged. On the other hand, it was judged better to write a new work, than merely to give a third edition of Mr. Bradby's treatise; for the lapse of twenty years between the first and second editions seemed to prove, that a work of a more general practical tendency was called for on so popular a subject.

This the author has anxiously endeavoured to furnish in the following pages.

The only branches of the Law of Distress which are treated of, are those of a distress for rent, and a distress of things damage-feasant. The other branches of the subject appear for the most part to be either too obsolete or rare in practice, or too heterogeneous in their nature, to claim any consideration in a work of this character. the generality of cases they could only have the effect of incumbering and confusing the more necessary matter; and when they are required, they are seldom wanted alone. On such occasions it will be more satisfactory and advantageous to refer to the entire subject in Mr. Serjeant Scriven's book on Copyholds, or Mr. Paley's work on Convictions, than to a mere isolated portion of it in a treatise like the present.

Anxious to avoid the confusion and obscurity which sometimes occur in those treatises where several causes of distress, dissimilar in their origin and in their nature, at common law and by statute, are considered at the same time, the author has kept altogether separate and distinct the subjects of the present work. For this purpose the treatise is divided into Two Parts, the first and more considerable being devoted to the distress for rent, the second to the distress of things damage-feasant.

For the same reasons, the author has endeavoured in the first part to distinguish on all occasions, as clearly as possible, between rent-service and rent-charge; and in some measure to treat of them severally and separately,—noting carefully those provisions which are common to both, and those which apply to one of the species of rent exclusively.

The Tithe-commutation Rent-charge and the distress for its recovery have been made the subject of a separate chapter—the last chapter of the First Part.

At the beginning of the work a short introduction has been given, tracing the history and progress of the Law of Distress from its probable origin to the present day. This was thought desirable, even in a practical treatise on the subject, since this part of the law, most especially, is so deeply rooted in antiquity, and all the reasons



THE RIGHT HONOURABLE

SIR NICHOLAS CONYNGHAM TINDAL,

LORD CHIEF JUSTICE OF THE COURT OF COMMON PLEAS,

ETC. ETC. ETC.

THIS WORK

ıs,

(WITH HIS LORDSHIP'S KIND PERMISSION,)

RESPECTFULLY DEDICATED,

BY

. HIS LORDSHIP'S

VERY HUMBLE AND MUCH OBLIGED SERVANT,

THE AUTHOR.



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PRACTICAL TREATISE

ON

LAW OF DISTRESS, &c.

INTRODUCTION.

ature of the Law of Distress, its origin, and progress.

ess, generally, is a remedy for the redress of Definition of r, the performance of a duty, or the satisfac- a distress, a demand; which consists in the taking, generally, legal process, of a personal chattel from the m of the wrong-doer or defaulter into the the party grieved, to be held as a pledge for ess, performance, or satisfaction required. Hendy was first known amongst us under the Derivation Namium, a word of Saxon derivation; and of the name, ds under that of Distress, from the Norman-of a later era.

ambiguous use of the term, the act of taking, thing taken, as well as the remedy generally, d a distress.

more particular def a distress for rent, 1; and of a distress lamage-feasant, post,

1. Gloss. voce Naimb. Leg. Conq. 62; Iist. Eng. Law, 32. 1. Gloss. voce Nam; n, ablatio pignoris, erni forenses districcant; anglicé, a disalso Id. vocibus, Namatio, Namatus, Namium, et Namus, Namo, Distringere, Districtus, et Districtio.

The term distresse is said to be a French word, from districtio, sive angustia, because the things distrained are put into a straight which we call a pound. Co. Lit. 96, a. Others derive it from Distringere, to compel. 1 Reeve Hist. Eng. Law, 33.

irposes to nich the medy of stress has en applied.

Amongst the various purposes for which a distress has been adopted by the law of England, the most important are,—as a remedy for the recovery of rent in arrear,-and as a redress for trespasses committed by cattle, or other things, damage-feasant. The nature of the remedy in these instances is such, that, in the former, the lord is authorized, on the tenant's default, to seize, as a pledge, whatever moveables he finds upon the premises out of which his rent issues; and, in the latter, the owner of the soil is empowered to take and detain, for the same purpose, any beasts or other things which trespass on his grounds, doing him damage (by treading down the grass, or the like).

Besides these instances, a distress is the remedy given to the lord for the recovery of all the other services arising from tenure, and of the several incidents thereto, as homage, fealty, suit of court, reliefs, and heriots.4 It is the means of enforcing the payment of fines imposed, or amerciaments made, by court-leets; of amerciaments charged on particular townships,6 and penalties inflicted by bye-laws;7 of tolls payable in respect of things sold in fairs and markets within particular franchises or manors;8 and of port-duties due to the owners of certain ports or havens for ships coming into, or otherwise using, the same.9 It has also, more recently, been adopted by very many acts of parliament, and applied by them to the exaction and recovery of the duties and penalties which they impose or inflict.1

The various provisions, as well of the common law. as of the different statutes, which regulate the use of the remedy in the particular instances to which it has been applied, constitute the present law of distress.

rigin of the

We appear to have derived the law of distress from iw of distress. the northern nations—from the fathers of that system

⁴ Gilb. Dist. by Impey, 4; Brad. 17, 139.

⁵ Brad. 19, 168; Gilb. Dist. by Impey, 11; and see Scriv. on Cop.

⁶ Gilb. Dist. by Impey, 20.

⁷ Id.; Brad. 180.

⁸ Id. 19, 186; Gilb. Dist by Impey. 18.

⁹ Brad. 19, 186.

¹ Id. 20; and see Paley on Convict. In this last instance, however, the remedy is a distress only in name.

with which we find it subsequently connected. At least, considerable evidence remains that it existed amongst them at an early period in its simplest, and perhaps its primitive, use,—namely, as a remedy for trespasses committed by cattle damage-feasant. find the following clause in the laws of the Ripuarii, Tit. 82, s. 2. Si quis peculium alienum in messe adprehensum ad Parcum² minare non permiserit, 15 sol. culpabilis judicetur. And the use of the pound is again mentioned, at a period almost as early, in the laws of the Angli and Werini, Tit. 7, s. 1. Qui gregem equarum in parco furatus fuerit in triplum componat.3 This remedy appears to be the most obvious and simple that could be devised for the purpose: it seems peculiarly adapted to the wants of a rude state of society and a migratory nation: and as the clauses which remain advert so explicitly to the impounding of the distress, it is not unreasonable to infer from them, that the general principle of the law was already known and established.4

The period of its extended application was probably Its extended of a less early date: other and severer measures had application. first to occupy its future position, and serve its later

purposes. Indeed its ultimate adoption as a means of recovering rent, and enforcing the discharge of the other feudal liabilities, appears to have resulted from

a gradual mitigation of the ancient rigour.

For in the times of primitive severity under the feudal system, the slightest failure on the part of the tenant was an absolute forfeiture of the feud: 5 and this long continued to be the case in respect of military tenures. But as the defence of the realm was not so directly affected by the socage holdings, it was afterwards thought too harsh that every omission

² Parcus est Stabulum, vel area angustior repagulis firmiter conclusa, quá nociva in frugibus prædiisque pecora, tanquam in carcere, coercentur. Anglico et saxonico vocabulo, a pound, vel a pinfold, q. a

poundfold. Spelm. Gloss. voce Parcus.

³ Spelm. Gloss. voce Parcus.

⁴ Brad. 4.

⁵ Vigel. 257, 271, 326; Jur. Feud. ann. 126, 129; Run. edit. of Hale; Gilb. Dist. by Impey, 1, 2; Brad. 2.

in these instances should induce so severe a punishment; particularly as the nature of the return due rendered it easy to ascertain an adequate compensation.⁶

Accordingly, at a subsequent period, on each default on the part of the tenant the lord entered upon the land, and held possession till such time only as he had obtained satisfaction for his damages. This method, however, comparatively lenient in appearance, was found on trial to be scarcely less oppressive than the previous one: for it generally deprived the tenant of his only means of supplying his default, and amounted in effect to the very punishment it was intended to extenuate.

In process of time, therefore, the same spirit which had made this ineffectual attempt introduced a still more mitigated remedy, by substituting for it the seizure of the cattle and other moveables found on the land; or in other words, by adapting the law of distress, as already existing, to the purpose required: so that the lord was now empowered to impound and detain the things taken, as pledges, to compel the performance of the services required by the feudal contract.⁸ At a later period the remedy thus first established in favour of socage, was extended to military tenures also; though it did not wholly obtain till the subsequent statutory commutation of those uncertain services.⁹

Such appears to have been origin of the law of dis-

⁶ Sul. Lec. 10.

⁷ This remedy, under the name of gavelet, founded on immemorial usage, still exists in Gavelkind Tenures in Kent, Robins. on Gavelk. 243, but it appears to be wholly fallen into disuse. Lamb. Peramb. p. 554, ed. 1596. Harg. n. 2, to Co. Lit. 142, a.

⁸ Brac. 1. 3, p. 130; Spelm. voce *Escheata*; Glan. 1. 7, c. 17; Heng. parva, c. 6, Co. Lit. i. 1, c. 1; Dalrym. on feud. prop. 62; Rol. Abr. 665.

⁹ Into a sum of money called *Escuage*, by stat. 4 Hen. 2. Sul. Lec. 10. Mad. Anto. Ex. v. 1, p. 652. We find the law of distress as a means of compelling attendance in the lords' courts particularly mentioned in the most ancient complications of the feudal law. See Assizes de Jerusalem, c. 3, 8, 20; Reg. Maj., 13, 16, s. 38; and Dufresne's Gloss. voce *Distringere*.

nd the easy course of its application to the y of rent, and to those other purposes for t has been employed; for there seems to be at warrant to give the credit of the invention e amongst whom we first discover it in use; we subsequently find it reaching its maturity st the institutions of the very nations to whom e its origin, it appears reasonable to believe well in its growth as in its rise, to be wholly ious in the feudal soil.1

earliest notice which we have of the law of Earliest men 3 in this country is in a restricting enactment tion of the la ute,2 where we find the remedy already estab- of distress in in an advanced state of maturity; and this is England. y occurrence in the few laws which remain to r to the Norman era, though there is reason eve, from a later reference,3 that it found a n a compilation of Edward the Confessor.

Conqueror, on his accession, is said to have ned the ancient laws of the realm; and amongst

. Gilbert, (Dist. 2) with hers, supposes the law ess to have been altoporrowed from the Rov: and, indeed, the law e pignus tacité contracid de distractione piggives some colour to opinion. Vide Dig. 1. ut there seems to be a 1 difference between man and English laws respect: in the forth the pignus and hywere pledges delivered debtor, or taken by the r, in consequence of a lar stipulation; whereremedy of distress by zlish law was always a of taking out of the of another, without his , a pledge, or security, satisfaction of a de-Lexic. Jurid. voce Pignus; Spegel. Lexic. Jurid. in eâdem voce; Brad. 2, 3. There appears to be also this further diversity between the law of distress and the pignory method of the civil law, viz., that the common law, which is supposed to have borrowed the custom, forbade the sale of the pledge.

The pignus prætorium, which was compulsory, was the result of judicial proceeding.

² Nemo alium intra satrapiam neve extra quidem ablatis pignoribus coerceto, ni priús jus æquum sibi fieri in centuriá ter postularit, &c. &c. liberam sui juris ubivis recuperandi licentiam assequitor. Lambard, 111. Spelman translates it,-Et nemo namium capiat in comitatu vel extra, &c.

3 See next note.

those mentioned as having been observed by Edward before him, we find the above law of Canute reenacted almost in the same words.⁴ But a very material alteration took place in English tenures, the grand aim of William's policy being to establish the Norman law in his new kingdom; and he soon contrived, as well by confiscation as by milder means, to introduce the feudal system with its oppressive accompaniments of services, relief, wardship, marriage, aid, escheat, and forfeiture. All the previous tenures were converted into feuds, inheritable according to the Norman law, but held by knight-service, or so-cage, of the king as lord in capite.⁵

Notwithstanding these changes, the law of distress, which appears to have obtained previously in Normandy, betti the ground against feudal severity. Distresses were taken, not only for rents and services reserved, but also for reliefs, to oblige attendance in courts of justice, to raise fines and amerciaments imposed, and in fact for the exaction

of all the incidents to tenure.

The law of distress, however trampled upon in practice, appears to have been well defined in all its provisions at common law; and from this period we may date the certain history of its progress:—premising, that most of the earlier statutory provisions were made, not in alteration, but in affirmance only, of the common law.

le son lum et pref. Lambard Leg. Conq.; Wilkins. Glos. voce Namiare.

⁵ Hume's Hist. Eng. App. 2; Co. Lit. p. 1, 2, ad. s. 1; Rep. Lib. 3. cap. 10.

⁶ The Grand Coustumier de Normandie contains a chapter *De deliverance de Namps*. And Basnage, in his Comm. on the Coutume Reformée, says *Namiis* in an old Norman word. Coutume Reformée, p. 83, 2nd. ed.

⁷ Sul. Lec. 10; Gilb.

Dist. 11.

⁴ Hæ sunt leges et consuetudines quas Willielmus Rex concessit universo populo Angliæ, post subactam terram. Eadem sunt quas Edwardus Rex cognatus ejus observavit ante eum. 42. De pignore, quod namium vocant, capiendo. Non capiat quis namium aliquod in comitatu, nec per vim usquedum ter rectum petierit in Hundredo aut in comitatu et si ad tertiam vicem rectum non potest habere, &c. &c. prenge conge ut possit namium capere pur

As it was necessary to provide a remedy against Progress of the oppression of unjust distresses, we find that at a law of distrevery early period the party distrained was able to replevy⁸ his goods, that is, to have them returned upon pledges given to abide the award of justice in the matter; and in order to effect this, several writs of replegiare, or replevin, were devised,⁹ which gave the sheriff to whom they were directed a justicial power to take cognizance of the affair.¹ Where it happened that the sheriff was unable to find the goods to deliver them to the owner, he was authorized to make a taking in withernam,² that is, to seize goods of the distrainer of a like nature and amount, and to keep them till the distress was

Notwithstanding these provisions, the unbridled independence and tyranny of the barons, during the civil wars which endangered the throne of the immediate successors of the Conqueror, turned distress into an engine of private revenge, and public violence: unjust pretences of distress were falsely alleged; tenants and strangers alike outraged; suit and service wrongfully compelled; exorbitant reliefs demanded; illegal fines extorted; excessive distresses made; the regulations for replevin disregarded;—in fine, every wrong practised for the oppression of the weak, and the aggrandizement of the powerful. By these means the laws and royal authority were set at defiance, and the rebellious barons were enabled to bring into the field great numbers of their vassals to disturb the peace of the kingdom.4

brought back.3

⁸ Replegio, to redeliver, or to redeem upon pledge; see

Spelm. Gloss. 485; post, 243.
Glanv. 1. 12, c. 12, c. 15.

¹ It is said, too, that even at common law replevin might have been made on verbal complaint to the sheriff, and excurity given to try the right disputed. 1 Reeve. Hist. Eng. Law, c. 4. C. B. Gilbert says

otherwise, and cites 2 Inst. 139; Hallet v. Byrt, 5 Mod. 254.

² From the Saxon, weder, other, and nam, distress.

³ Bract. 157; post, p. 246, 255.

⁴ Barr. on stat. 12, 13, 31; Mad. Antq. Ex. c. 13; Sul. Lec. 101, 102; Gilb. Dist. by Impey, p. 2. The history

Towards the end of the reign of Henry the Third particular laws were made to regulate the manner of distraining; and to prevent the lords from extending this remedy beyond the purpose for which it was first introduced. Magna Charta,5 and the statute De Districtione Scaccarii, successively supported the provisions of the common law: and in the fiftysecond year of the same reign the statute of Marlbridge established regulations on the subject more important than those of any other of our ancient statutes.

But still greater severity was demanded to repress similar grievances; and the subject was further enforced in the third year of the reign of Edward the First, by the statute of Westminster the first. at intervals of a few years was succeeded by the statute of Westminster the second,7 and the Articuli super Chartas:8 and in the following reign the Articuli Cleri restrained the remedy of Distress as in use against the clergy.9

Most of these statutes related to the law of distress generally, for whatever purposes it was then in use; though some had reference only to particular causes of distress. Their principal provisions were—that no one should be distrained for more than was really due; that distresses should be reasonable; that lords should not take distresses out of their own fee or jurisdiction;3 nor distrain their freeholders to answer for their freeholds;4 that delivery of distresses by the king's officers, and replevins should be

of these disorders is perpetuated in the preamble to the statute of Marlbridge, and in the provisions of the ancient statutes on the subject. Indeed, the statutory provisions in support of the law of distress are an index to the history of the times which called for their enactment.

⁵ Magna Charta, c. 10. 51 Hen. 3.

⁷ 13 Edw. 1, stat. 1.

^{8 28} Edw. 1, c. 12.

^{9 9} Edw. 2, stat. 1, c. 9. ¹ Magna Chart. c. 10; stat. Marlb. c. 2; stat. West. prim. 3 Edw. 1, c. 23.

² Stat. de Dist. Scac. 51 Hen. 3; stat. Marlb. c. 4.

³ Stat. Marlb. c. 2; stat. West. prim. c. 16.

⁴ Stat. Marlb. c. 22.

duly made; 5 that a distress when taken should not be driven out of the county. 6

These various provisions in affirmance of the law of distress for the most part supported it by penalties much more severe than were known to the common law. They appear in a great measure to have been effectual; for the particular subject-matter of these statutes did not require any subsequent interference on the part of the legislature: till at length in the reign of Philip and Mary it became necessary farther and more definitively to enforce that provision of the existing law, which required a distress to be impounded within the county: it was then also exacted that it should not be impounded in several places, so as to compel the party to sue several replevins: and every sheriff was directed to appoint four deputies in his county to make replevins and delivery of distresses.7

The object of all these statutes, to which we have hitherto referred, was evidently to protect the tenant from the oppression of the lord; and this was necessarily the chief care of the legislature up to the long interval of silence on the subject, which occurred between the reigns of Edward the Second and Henry the Eighth. But in lapse of time the gradual increase of civilization, and the firm establishment of authority, had effected such a change of circumstances as rendered a further prosecution of this course unnecessary. The tyranny of the lord had died away when the objects of its earlier exercise became impracticable; and the default and knavery of the now more independent tenant demanded in turn redress from the legislature. So that almost every subsequent interference appears to have been directed to the very different object of improving the remedy in the hands of the landlord.8

Chart. c. 12.

Stat. Marlb. c. 3, 21;
 Stat. West. prim. 3, 17.
 Stat. Marlb. c. 4; stat.
 West. prim. c. 16; Art. super
 Rad. 13.

In order to ascertain to what extent it has been improved and enlarged by the provisions of these more recent statutes, it is necessary to advert to those regulations of the common law, which straightened the hands of the landlord in the legal exercise of his remedy, and protected the tenant in the dishonest subtraction of his dues.

Thus we must observe, that at common law neither the heirs nor the personal representatives of a party entitled to a rent could distrain for arrears incurred in the owner's life-time; the consequence of which was, that these arrears were often wrongfully withheld by the tenant, and the personal estate of the deceased injured. To remedy this evil the statute 32 Hen. 8, c. 37, gave the executors and administrators in certain cases a power of distress;—which has very recently been further extended by the provisions of the statute 3 & 4 Will. 4. c. 42, ss. 37, 38.

But incomparably the most important alteration in favour of the landlord was made in the reign of William and Mary. It must be remembered, that formerly a distress for rent, (and indeed every other distress except that for an amerciament, or at the suit of the king.) when made, was only a pleage to be retained in the hands of the distrainer, but could not be sold; and consequently, although such a distress put the owner to inconvenience, and was so far a punishment to him, yet if he continued obstinate, and would make no satisfaction or payment, it was no remedy at all to the distrainer. In order to obviate this inconvenience, it is provided by the statute 2 Will. & M. c. 5, s. 2, that in all cases of distress for rent, upon any demise, lease, or contract, if the tenant or owner do not, within five days after notice given to him of the distress, and of the cause of making it, replevy it with sufficient security, the distrainer shall

⁹ See Preamble to 32 Hen. 8, c. 37.

¹ Post, p. 63, 64.

² 3 Bl. Com. 14; see also Preamble to 2 Will. & M. c. 5, s. 1; Brad. 13.

have it appraised and sold towards satisfaction of the rent and charges, rendering the overplus, if any, to the owner of the goods distrained.3

Again, amongst other rules of the common law relative to the subjects of a distress, there was one, that things belonging to the freehold were not distrainable; and another, that nothing should be distrained (as a pledge) which could not be restored in as good condition as that in which it was when taken. the former of these rules landlords were prevented from distraining growing crops on the tenants' land; and by the other, from taking corn even after it had been cut; restrictions which in fact deprived them of the best remedy for the recovery of their rents.4 The reason of the latter rule being taken away by the power of sale given by the second section of 2 Will. & M. c. 5, a subsequent section of the same statute enabled the landlord to distrain corn in sheaves, or cocks, or loose, or in the straw, or hav in barns, ricks, or otherwise, as well as other chattels.5 And at a later period he was empowered by statute 11 Geo. 2, c. 19. s. 8, to distrain growing corn, grass, hops, fruits, roots, pulse, or other product of the land, and to cut and gather them when ripe, to be disposed of by appraisement in satisfaction of the rent.6

The statute 8 Anne, c. 14, supplied two further deficiencies. It gave persons entitled to rent in arrear upon any lease for life, years, or at will, a remedy by distress for such arrears within six months after the determination of the term,—if made during the continuance of the landlord's title, and the possession of the tenant,7—which could not have been done at common law. And it afforded redress in a much more important case, in which landlords were previously without remedy, namely, that of the clan-

³ Post, p. 150.

⁴ See Preamble to 2 W. & M. c. 5, s. 3.

⁵ 2 Will. & M. c. 5, s. 3; post, p. 91:

⁶ Post, p. 94.

⁷ 8 Anne, c. 14, ss. 6, 7; post, p. 120.

destine or fraudulent removal of the tenant's goods from the premises demised, in order to avoid a distress; for by that statute, they are empowered to follow and distrain the goods, within five days after such removal. This latter provision has since been enlarged and rendered more effectual by the statute 11 Geo. 2, c. 19, s. 1, which extends the landlord's powers, and enables him to follow and distrain the goods wherever they may be found, within thirty days after such removal.

By the 10th section of the statute 11 Geo. 2, c. 19, the party distraining for rent is enabled to impound or secure the goods distrained, and to have them appraised and sold on any convenient part of the premises chargeable with the rent: which has obviated the inconvenience of an immediate removal of the distress, without which, at common law, the distrainer would have been liable to be treated as a trespasser.

Another rule of the ancient common law on this subject tended, perhaps more than any other, to defeat the purposes of justice, and rendered a distress a very unacceptable remedy. This was, that if the party distraining were guilty of any irregularity in making or conducting the distress, he thereby became a trespasser ab initio: a rule deduced from an ancient maxim of the common law, remarkable rather for its rigour than for its equity; namely, that whoever pursued a legal remedy in any other way than that prescribed by law should be considered as having purposed from the beginning to commit a tortious act 9. This maxim when applied to a distress for rent, especially after the statute of William and Mary had authorized its sale in a particular manner, rendered such a distress a very hazardous proceeding. The evil was at length remedied by the statute 11 Geo. 2, c. 19, s, 19, which provides, that for any irregularity committed in making or conducting a distress for

⁹ See Six Carpenters' case, p. 126.

9 See Six Carpenters' case, 8 Co. Rep. 147.

rent, the party guilty of it shall not be deemed a trespasser ab initio, but that damages shall be recovered by the person aggrieved by such act, in proportion to the injury sustained 1.

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The statute 4 Geo. 2, c. 28, s. 5, extended the existing provisions for the recovery of rent by distress in cases of rent reserved upon lease to all cases of rents seck, rents of assize, and chief rents; establishing by this means an uniformity of remedy in every instance of rent 2.

The statute 57 Geo. 3, c. 93, is an Act passed to regulate the costs of distresses levied for the payment of small rents; and in such instances it gives the parts grieved, besides the usual legal remedies. a means of obtaining summary redress by applying

to a justice of the peace 3.

The recent statute of limitations as to real property, 3 & 4 Will, 4, c. 27. s. 2, enacts, that no person shall distrain for rent but within twenty years next after the time when the right to distrain first accrued: and by section 42, no arrears of rent shall be recovered by distress but within six years next after the same shall have become due, or next after an acknowledgment of the same in writing 4.

The statute 5 & 6 Will. 4, c. 59, requires that every person impounding any cattle, or other animals, shall supply them daily with good and sufficient food; and authorizes their sale for the discharge of the value of

Such are the principal provisions in support, and in alteration, of the common law, which the legislature has thought fit to enact in order as well to protect the tenant from oppression, as to improve the remedy in the hands of the distrainer; and by these means has a distress for rent been rendered one of the most equitable and efficient remedies known to the English law 6.

¹ Brad. 16; post, p. 178.

² Com. Dig. tit. "Distress."

A. (i); 2 Bl. Com. 6; post, p. 32, 152.

³ Post, p. 162.

⁴ Post, p. 117, 119.

⁵ Post, 143, 152-3.

⁶ Brad. 17.

Present definition of a distress for rent.

At present the statutory enactments constitute an integral part of the remedy, and a distress for rent may now be correctly defined to be a remedy for the performance of a duty, or the satisfaction of a demand, which consists in the taking, without legal process, of a personal chattel from the possession of the defaulter into the hands of the party grieved, as a pledge for the performance or satisfaction required; with a power, in case of continued default, to sell the thing taken in compensation for the damage sustained.

A distress of things damage-feasant remains nearly the same as it was at common law, and has been but little, if at all, affected by the above course of legislation; for although the statute 5 & 6 Will. 4. c. 59, has rendered a sale of the distress possible under certain circumstances, yet it is only incidentally, and out of regard to the thing distrained, not to the remedy of the party injured 7.

Having thus taken a general view of the origin and progress of the law of distress from the earliest period of its appearance down to the present day, we shall proceed to enquire more minutely into the details of its provisions in those principal branches which form the subject of the present treatise.

⁷ Post, 239.

PART I.

OF A DISTRESS FOR RENT.

CHAPTER I.

FOR WHAT RENT A DISTRESS MAY BE MADE.

Sect. 1. Of Rent generally, its several kinds.

Sect. 2. Of the apportionment, suspension, and extinction of Rent.

SECTION I.

Of Rent generally, its several kinds.

RENT itself, like the means of its recovery by dis-Origin of 1 tress, appears to be with us of feudal origin. However primæval may have been its earliest institution, all the requisites and attributes of its present form in the laws of England prove it to have been an integral part of the economy of the feudal system, and to have reached us from that source.

We learn that in the times of northern invasion, a large proportion of the land was appropriated by the conquering general or king to the support of his dignity and government: the remainder was divided into conditional allotments, or feuds, amongst the chieftains, his immediate vassals, as tenants in capite of the sovereign. A sub-infeudation then took place; the chieftains erecting petty sovereignties for themselves by dividing their shares among their

¹ Spel. Glos. voce Feudum; 2 Bl. Com. 45.

retainers.2 The terms of these military and the oath of fealty which generally follo vestiture, obliged the vassal to a faithful re services in field and council, whenever called support of his lord, and in defence of the This system of sub-infeudation was ultimat tended to all the members of the state, on conventional terms of tenure; for the warlike tories, being under frequent incapacities of ting their own lands, soon found it neces commit part of them to inferior tenants, c these to such returns in service, corn, ca money, as might enable their lords to at their military duties without distraction. returns, or *redditus* were the original of rents.

Definition of

Necessary requisites of a rent generally.

Rent,⁵ generally, (that is to say, without re rent generally. to any of its particular kinds, of which we sha presently,) may be defined to be a certain profit arising out of lands and tenements corporate

This profit may consist either of money usually does, or of money's worth, as for e of arms, horses, corn, or other things,6 which casionally rendered by way of rent.

It must issue out of the land, and not be the land itself; so that the grass, herbage, a vesture cannot properly constitute a rent.7

Rents, 26. There is ference between a tion, which is alwa thing not in being, I newly created or out of the land or 1 demised; and an e which is part of t itself, and a thing i In the case of min ever, it seems that may consist of a pe the ore, which is stance of the lan Campbell v. Leach 740; Buckley v. Ker East, 139; R. v. fret, 5 M. & S. 139 also, R. v. Inh. St. 2 B. & A. 693.

² Wright, 7.

³ Spel. Rem. 43; Bacon on Gov. 47.

^{4 2} Bl. Com. 57.

⁵ Redditus-a reddendo, because it is rendered or returned out of the profits of the land when received; for reddere nihil aliud est quám acceptum aut aliquam partem ejusdem restituere. Co. Lit. 142, a. It is also said to be derived from redeundo, because retroit et quotannis redit. Fleta, 1. 3, c. 14; Britton, c. 41.

Co. Lit. 142, a.

⁷ Co. Lit. 47, a. Because they are part of the thing demised. Id. and 142, a; Gilb.

ist be payable yearly, because the profits of d are of annual production; but it need not ble every successive year; a rent payable cond or third year will be equally valid.

e of payment.⁸ Therefore, a rent payable the rate of 18l. a year" has been held void for nty, as the nature of the rent, whether in r kind, did not appear, nor the periods of its ts.⁹ But it is sufficient if there be any exms in the creation of the rent by which the may be reduced to a certainty, for id certum certum reddi potest: 1 and as to the period of t, where the terms are general, and time not 1, the law will imply a yearly payment to be 1.²

lastly, a rent can, in general, issue only out or tenements corporeal, to which the person to it may have recourse to distrain³. Conly it cannot issue out of a piscary, common, e, or other incorporeal hereditament⁴, nor a personal chattel⁵; nor can the agreement of

Lit. 96, a. er v. Harris, 4 Mod.

1 Salk. 262. v. Mohun, 2 Vern. ; s. c. 2 Freem. 291; url. Cas. 248; Gilb. 45; Co. Lit. 96, a, On the other hand, lease of tithes and granted at an entire d was void as to the cause not under seal, was held altogether , because there was ct rent due for the ardiner v. William-& Ad. 337 : Neale nzie, 1 M. & W. 747. v. Sury, Latch. 264. Lit. 47, a; 144, a. 'or the party entitled nt cannot go upon it n: nor could it have in view in an assize. reason given is, that every incorporeal right originally arose by grant from the crown for some particular purpose, which would have been obviated if such incorporeal inheritances had been capable of being let for a rent reserved. Gilb. Rents, 20, 22.

But a reservation on a lease of incorporeal hereditaments, though not recoverable as rent, will bind the lessee by way of contract, and render him liable to an action in default of payment. Co. Lit. 47, a.

⁵ Spencer's case, 5 Co. Rep. 17. This rule once caused it to be doubted, whether rent reserved on a lease of land with stock upon it, or on the demise of a ready-furnished house or lodgings, could be distrained for, as the greater proportion of the rent must

the parties alter the law in this respect⁶. A cannot issue out of a rent, for it is in itself an poreal tenement⁷. It may issue out of the vest herbage of land, for that is so far of a cor nature, that the person entitled to the rent m upon the land and distrain the cattle feeding the

These are the general and common requisite cessary to the existence of a rent of whatever

or denomination.

The several cinds of rent.

There are three several and distinct kinds of namely, rent-service, rent-charge, and rent and these, as being the objects of this branch law of distress, it will be necessary to consider at length.

Rent-service, what.

Rent-service is said to be where the tenant the land of his lord by fealty and a certain re by a certain rent together with homage, feal other services; and it is called rent-service fro corporal service, as fealty at the least, belongi it. For fealty is an inseparable incident to tenure, and therefore necessarily forms a particular to the service is an inseparable incident.

evidently be paid for the goods; but it is decided that it can, because in contemplation of law, the whole rent issues out of the land or premises demised. Newman v. Anderton, 2 New R. 224; Brad. 26. The late case of Robinson v. Learoyd, 7 M. & W. 48, was decided on the express words of the 4 Geo. 4, c. 28.

Butt's case. 7 Co. Rep. 23.
 2 Roll. Abr. 446.

⁸ Co. Lit. 47, a. A rent may be reserved to the king out of any incorporeal hereditaments, because by virtue of his prerogative his remedy is not limited to what the rent is strictly reserved out of, but he may distrain on all the lands of the lessee. Mount-joy's case, 5 Co. Rep. 4.

⁹ Lit. sec. 213.

¹ Co. Lit. 87, b. 142, a.

² Lit. sec. 131; Co. Lit.

93, a. Except to the : tenure of franck-almois And if rent be reserved an agreement const strictly a tenancy at wi is not rent-service, for is no fealty incident to a tenure; but with res the remedy by distress, by the common law incidents of a rent-s Co. Lit. 57, b. 142. a, the present day, how tenancy at will with reserved rarely occur though a person, who possession of land in quence of a mere agre for a lease, is tenant until the lease be mad whatever stipulation may be in the agreem to the rent to be paid the future lease, that be so connected with t nancy at will, as to ena

This is the original and princient-service. d of rent; the only one strictly of feudal derias well as the only one anciently known to nmon law. It is in fact rent properly so called. that which arises from, and depends upon,

It is that return of the profits which a lord s to himself on parting with an estate in his nd which is payable by the tenant in respect to the lord, according to the terms and nature tenure,—whether to the lord of the manor, or to a mere lessor or reversioner.

his kind of rent, and to this alone3, the remedy Distress inciress is incident of common right4,-provided dent to rentie reservation be made conformably with the service of common right. of the common law.

3 it is necessary to the creation of a rent- What is neces-, besides the above requisites which it must sary to constin common with every kind of rent, that it tute it. be reserved upon a sufficient conveyance; and should be properly reserved, in respect of the s to whom it is made payable, according to the of the estate, and as being incident to the reof the land out of which it issues.

nt-service must be reserved on a sufficient con- On what cone; that is, upon some demise or grant either veyancea rent-5 an estate to the tenant, or enlarging an estate service may in him⁵. For although a reservation may be either by indenture, or by deed poll, or by ven without writing (if within the exception in tute of frauds), provided an estate—either in sion, reversion, or remainder,—be made to pass tenant; yet any reservation, where no estate is void⁶. At common law a rent-service could reserved upon a bargain and sale, because

to distrain. If, howınder such circumrent be actually paid, cy from year to year at rent, instead of the at will without any return, will be inferamerton v. Stead, 3 B. 83; Knight v. Bennett,

3 Bing. 361; see infra, p. 22. ³ Excepting, always, rents distrainable of common right; see infra, p. 31.

4 Lit. sec. 214.

⁵ Co. Lit. 144, a. Bac. Abr. Rent, C.

⁶ Bac. Abr. Rent, C.; Bradley, 214

only an use, but no estate in the land, passed by conveyance before the statute of uses?; but no that statute, the possession being executed use, the bargainor may distrain for the rents agreement for a future lease at a certain rent, which a tenant takes possession, no lease be fact executed, and no other circumstances ender which a demise of any estate or any constenancy can be implied, is not a sufficient reser of rent to give the proposed lessor a right to dis Whether an instrument amounts to a present dor operates only as an agreement for a future is often a question of great doubt, and has a been a fruitful subject of litigation. To as

⁷ 27 Hen. 8, c. 10.

⁸ Co. Lit. 144, a.

⁹ Dunk v. Hunter, 5 B. & Al. 32"; Hegan v. Johnson, 3 Taunt. 148; Regnart v. Porter, 7 Bing. 451; s. c. M. & P. 370; Hamerton v. Stead, 3 B. & C. 478. As no rent is due for the occupation, but only a compensation in the nature of rent, the owner must resort to his remedy by action for use and occupation.
¹ On this point the follow-

ing cases may be consulted .- Those in which the instrument has been held to amount to a lease. Maldon's case, Cro. Eliz.33; Harrington v. Wise, Id. 486; Tisdale v. Essex, Hob. 34; Evans v. Thomas, Cro. Jac. 172; Richards v. Sely, 2 Mod. 80; Drake v. Munday, Cro. Car. 207; Lady Montague's case. Cro. Jac. 301; Colebourn v. Mixstone's case, 1 Leon. 129; Baxter d. Abrahall v. Brown, 2 W. Bl. 973; Right d. Green v. Proctor, 4 Bur. 2208; Barry v. Nugent, 5 T. R. 165, n.; s. c. 3 Doug., 179;

Poole v. Bentley, 15 168; s. c. 2 Camp. 28 d. Colcombe v. Fidler. Ad. C. 33; Doe d. We Groves, 15 East, 244; v. Trevezant, 3 C. & 1 s. c., M. & M. 231; v. Judson, 6 Bing. 20 3 M. & P. 497; Stani Fox, 7 Bing. 590; s.c. & P. 589; Doe d. Pet Ries, 8 Bing. 178; s. c Sc. 259; Hancock v. 8 Bing. 358; s. c. 1 521; Wilson v. Chis C. & P. 474; War Faithful, 5 B. & Ad. s. c. 3 N. & M. 137; man v. Bluck, 4 Bins 187; s. c. 5 Sc. 515; man v. Neate, 4 M. & 1 Pearce v. Cheslyn, 5 1 652.

^{2.} Those in which strument has been cor to be an agreemen Sturgeon v. Painter 128; Goodtitle d. East Way, 1 T. R. 735; Coore v. Clare, 2 T. 1 Roe d. Jackson v. Asl 5 T. R. 163; Hegan v.

t of the instrument, the intention of the o be collected from the whole of the words them, is to be considered 2. And it may be n as a rule, that whatever words are suffiexplain the intent of the parties that one ivest himself of the possession, and the other it, for any determinate time, such words, they run in the form of a licence, or of a , or of an agreement, are of themselves sufnd will in the construction of the law amount ise.3 The general feeling of the courts latbeen to construe instruments of this deas leases, if possible, and not as agreements ise merely:4 though in a recent case an has been expressed, that it would have been so wide a construction had not been given Where the instrument is ambiguous the acts parties may be called in aid to ascertain the ... Even where a person enters under a reement for a future lease, subsequent circes may cause the passing of an estate to be and have the effect of constituting the v actual tenancy: thus, where a tenant, who

unt. 148; Morgan g v. Bissell, 3 Taunt. . Bromfield v. Smith, 0; Tempest v. Rawlast, 1 . , Brown v. 4 Ves. 156 : Die d. 1. Brown, 8 Last, ik v. Hunter, 5 B. & Colley v. Streeton, 522; Hamerton v. B. & C. 478; s. c. 206; Clayton v. v, 5 B. & C. 41; & R. 800; Phillips y, 3 C. & P. 121; 'enkins, 1 C. & M. knell v. Hood, 5 M. 1; Rawson v. Eihe, 451; s. c. 2 N. & P.

an d. Dowding v.

Bissell, 3 Taunt. 63; Roe d. Jackson v. Ashburner, 5 T. R. 163; Perring v. Brooke, 7 C. & P. 360; 1 M. & Rob. 510, per Coleridge, J.; per Lord Abinger, C. B., and Parke, B., Bicknell v. Hood, 5 M. & W. 108.

³ Co. Lit. 45, b; Bac. Abr. tit. Lease (R.); 2 Bl. Com. 318; and per Parke, B., Bicknell v. Hood, 5 M. & W. 108. 4 Har. Woodf. Land. & Ten. 119, 3rd ed.; and see the cases cited above.

⁵ Alderman v. Neate, 4 M. & W. 720.

⁶ Per Tindal, C. J., Chapman v. Bluck, 4 Bing. N. C. 187; s. c. 5 Sc. 530; Cox v. Bent, 5 Bing. 185; s. c. 2 M

had entered on premises under an agreeme lease, admitted a charge of half a year's re account between himself and his landlord held that this constituted him a tenant fror year, and liable to a distress: and where took possession of premises under an agree a lease, to be granted to him for seven y yearly rent, payable half-yearly; but no leasecretained, nor was the quantum of rent to ment for three years, and paid rent for two held that this created a tenancy from year and entitled the landlord to distrain for the due, at the rate of rent previously paid.

To whom and how a rentservice must be reserved.

A rent-service must also be properly res respect of the person to whom it is made that is, conformably to the nature of the est as being incident to the reversion of the lan which it issues. Therefore a rent-service ca reserved to a stranger; for since it is payabl as a return or compensation for the possessic land, it can be reserved only to the person lessor, or of him from whom the land passes, —if the reservation be extended further—to versioner to whom the land would afterwar belonged if it had not been demised. In sor an improper reservation in respect of the per destroy the rent. As, where a lease for ye made by a tenant in fee simple and his son, apparent, to commence after his father's de serving rent to the son by name, but not to

[&]amp; P. 281; Knight v. Bennett, 3 Bing. 361; s. c. 11 Moore, 222; Doe d. Pearson v. Ries, 8 Bing. 181; s. c. 1 M. & Sc. 264, per Tindal, C. J.; Roe d. Jackson v. Ashburner, 5 T. R. 162, per Ashurst, J.

⁷ Cox v. Bent, 5 Bing. 185; s. c. 2 M. & P. 281.

⁸ Knight v. Bennett, 3 Bing. 361; s. c. 11 Moore, 222; see. also M'Leish v. Tate, Cowp. 784; Coupland v. Maynard,

¹² East, 134; vide

⁹ Except by the K is exempted from Co. Lit. 143, b. joint-tenants in a c deed indented may rent to one of ther has privity of cont estate. Lit. sec. 346; Gi 61.

s of the father, the reservation was held to be for the rent could not be reserved to the son ranger,-which had in effect been done by a tion to him by his proper name,—and it was served to the heir or heirs of the father; so though the son in fact proved to be the faneir, the event could not mend a reservation lly void⁷. An improper reservation in this will not, however, in general destroy the rent, law uses all imaginable industry to conform ervation to the estate8. Thus, if rent be reto a sub-lessor and his heir during the term ider-lease of part of a chattel interest, this rent go, it seems, to the executor⁹. So, if a tenant make a lease and reserve the rent generally heirs, it will go to his heirs in tail 1. And if nt-tenants demise by parol or deed-poll, reservit to one of them, it will enure to both². In like r a rent issuing out of gavelkind lands, and ed payable to a man and his heirs, will follow ture of the land3. Where there is no specifiof the persons to whom rent reserved is to be e, it will by law enure according to the nature estate⁴. But where there is a specific reserof the rent to the lessor, without naming any persons, as heirs or executors, to whom it shall 1 afterwards, it will be confined to the person om it is so reserved, and will cease altogether death, for expressum facit cessare tacitum⁵; it be reserved payable "during the term," in

tes v. Frith, Hob. Rep. Lit. 47, 143, b. Com. Rent, B. 5.
Lord Hale, Sacheve-Frogate, 1 Vent. 162, Saund. 367.
cheverell v. Frogate, 1 162, s. c. 2 Saund. 367.
onstruction, however, to depend upon the the rent having been d during the term; of clause, see infra.
Com. Dig. tit. Rent,

² Co. Lit. 47, a. aliter if reservation made on demise by deed indented, Lit. sec. 346; see supra.

³ Randall v. Jenkins, 1 Mod. Rep. 110, s. c. 2 Lev. 87. For other analogous cases of the construction of improper reservations, see Com. Dig. tit. Rent, B. 5.

⁴ Shep. Touchs. 114.

⁵ Id. Cother v. Merrick, Hard. 95.

26 Rent.

> which case this express evidence of the lessor tion, that the payment of rent should he con rate in duration with the continuance of th will preserve the rent to the end, and the law tribute it according to the nature of the estat

reversion.

It is also absolutely necessary for the exis-Incident to the a rent-service, that the person to whom (acco the nature of the estate) it is payable, sh always entitled to the reversion, either im or remote, of the land out of which it issues to say, to that portion or residue of the grai lessor's estate which remains in him after the ance of the particular estate on which the re served⁷. For the rent is incident to this re in as much as it is a return of the profits for session and enjoyment of the land, and theref able to him who previously had, and would o still have, the land itself. Before the statute emptores a man might have reserved a rent to himself and his heirs on a feoffment in fee for the feoffee would then have held the lanfeoffor as his immediate feudal lord9; but that having enacted, that where a tenant aliens to his whole estate, the alienee should hold imm of the lord, and not of the alienor; it has ev been necessary for the creation of a rent-serv

⁶ Sacheverell v. Frogate, 1 Vent. 162, s. c. 2 Saund. 367. And this is therefore said to be the most clear and sure form of reservation. Whitlock's case, 8 Co. Rep. 69.

⁷ Lit. sec. 215. Co. Lit. 142, b. 143, a. A reversion is where the residue of an estate always doth continue in him that made the particular estate. Co. Lit. 22, b.

This reversion, necessary to the existence of a rent-service. is not to be understood only of a reversion immediately expectant upon the gift or lease. For if a man maketh a gift in tail, remainder in tail, reserv-

ing a rent, and keer version in himself. rent-service. Co. Li And where A, seize leased premises to years, and afterward: a lease to C. of the s mises, to commence expiration of 61 year held that A. did no lease to C., part witl version, so as to prec from distraining for from B. Smith v. D & W. 684. See also laid down in Threr v Moore, 94.

^{8 18} Edw. 1.

⁹ Lit. sec. 216.

ld be reserved on a conveyance of less than ble of the grantor's or lessor's estate, so as to reversion in himself, and thereby to preserve ation of lord and tenant. It is so incident to ersion, that a grant of the reversion carries with it; if the reversion be granted, reserving t, the rent changes its nature on the separand if the reversion be destroyed or merge, the extinguished ¹.

-charge is either by grant, as where the owner Rent-charge by deed poll or by indenture, grants a yearly what. be issuing out of the same land to another in for term of life or years, with a clause in the nat if the rent be in arrear, it shall be lawful grantee or his heirs to distrain²; or by reseras where a man conveys away his whole csr example, in fee-simple, since the statute of uptores, leaving no reversion in himself, and reto himself and his heirs a certain rent with a of distress: and this is called a rent-charge. the lands are charged with the distress by f the clause in the deed only, and not of comght3. This is, therefore, a species of rent unconnected with tenure; and though of great ty 4, it was always considered and treated as v to the policy of the common law; for the effect of a rent-charge was to render the tenant le to perform the services to which he was by his tenure; and the grantee was under no obligations 5.

r v. Barton, Moore, bb v. Russell, 3 T. R. horn v. Woollcombe, 3 . 586. sec. 218.

sec. 217. Bradbury it, 2 Doug. 628; Je-Couley, 1 Saund. 113. harge by prescription, 144, a, must, it seems, osed to have comeither by grant or ren.

icularly in the case of u of a rent, which was

originally the only kind of rent-charge, and was probably introduced for the purpose of providing for younger children. A rent-charge by reservation on the conveyance of a whole estate in fee simple without saving the reversion, was rendered necessary, (in order to secure the remedy by distress), by the statute of Quia emptores. See supra.

⁵ Gilb. Rents, 17, 18, 133; Wat. Gilb. Ten. 402.

For the creation of a rent-charge nothing is sary beyond the requisites which it must have i mon with every other species of rent, except t land out of which it issues be sufficiently c with a distress by deed. It may issue out estate in fee tail, for life or years, in possessi version, or remainder, and may be granted, served, for any estate commensurate with the grestate in the land itself.

1 It may be proper to observe here the distinction between a rent-charge and an annuity; the one being, as we have seen, a rent imposed upon and issuing out of land; the other, a yearly payment of a certain sum of money, granted to another, and charged only on the person of the grantor. Co. Lit. 144, b. Therefore, if a man by deed grant a yearly sum to another, without expressing out of what lands it shall issue, no lands at all shall be charged with it, but it will be a mere personal annuity. 2 Bl. Com. 40. Every grant of a rent-charge is properly an annuity, unless the person of the grantor is expressly excepted from liability, Lit. sec. 220: and it is in the election of the grantee, whether he will have his remedy against the person of the grantor, or against the land; but this election once distinctly made is final and conclusive. Lit. sec. 219. Co. Lit. 144, b. Every annuity, however, as is apparent, is not a rent-charge. Where a person intending to grant a rent does it in such a manner as to be void as a rent, yet it will generally be good as an annuity; as if the land, out of which it

is to be issuing, do long to the grantor: sufficient, or be of a incapable of yielding &c. A rent-charge i considered to be in th of an annuity, that pressly included, in section of the annuit Geo. 3, c. 26. And, tl rent-charges grante that statute, are inval inrolled in the manne prescribed, unless ti within the exception tained in the 8th se the act, namely, as rent-charge given by by marriage-settlemer the advancement of a be secured upon lands or greater annual valu of the grantor was s fee-simple or fee-tail i sion at the time of th or secured by the actu fer of stock, the divides of greater or equal an lue, or a voluntary without pecuniary co tion, or being grant body-corporate, or u Act of Parliament, or ceeding ten pounds a unless there be more t such annuity between parties.

nt-charge may also be granted to issue out of cel of land, and the distress for it be charged ther; in which case, it seems, that the distress made only on the land on which the distress easly charged.²

-seck is either, where a rent is granted by deed Rent-seck, anger to be issuing out of certain land, but what.

any clause of distress ³; or where a man rearent, for example, to himself and his heirs, so statute of *Quia emptores*, on the alienation of ole estate, without any power of distress by and it is called rent-seck, because in its nay and barren of the remedy of distress ⁵. ike a rent-charge, it is either by grant, or by tion; and in fact it differs from a rent-charge ing, except, that there is no distress charged so land out of which it issues by deed.

ms, however, to be held that a rent-seck cannot it of a mere chattel. So that if an annual sum ited out of a term of years, or reserved on inment of a term of years, leaving no reversion ssignor, it is a mere annuity and not a rent 6. is said, that a rent-seck cannot be granted for it only in fee, in tail, or for life 7.

ec. 221; Co. Lit.147, 's case, 7 Co. Rep. But quære—whether c. 28, s. 5, (see innot altered the law espect, and enabled tee in such case, to in both parcels of ess the parcel, out of e rent is issuing, be exempted from the 1 Byth. by Jarm. 621. sec. 218; 2 Bl. Com.

sec. 217.
:-seck idem est quod iccus. Lit. sec. 218.
-v. Cooper, 2 Wils.
utt's case, 7 Co. Rep. h v. Mapleback, 1 G. Parmenter v. Webber,

8 Taunt. 593. Preece v. Corrie, 5 Bing. 24, are also cited in support of this position. See some observations upon it, Appendix (A).

7 1 Byth. Conv. by Jarm. 623. " For although it is stated in 6 Bac. Abr. 6 Gwil. ed.: 4 Bac. Abr. 337, 4th ed. Rent, (A) 3, that if a man seized in fee grant a rent for years without a clause of distress, it is a rent-seck, yet as the authorities cited (Lit. sec. 215, 218; Morris v. Prince, Cro. Car. 520; Keilw. 104, pl. 11. Walsal v. Heath, Cro. Eliz. 656,) do not support that position; and as the old law books never mention a rent seck for years, but always Fee-farm rents, &c.

Some of the ancient rents, which are strictly comprised within one or other of the preceding divisions, are yet known by particular names. Thus, a fee-farm rent is a perpetual rent reserved on a conveyance of lands in fee simple, the name being founded on the perpetuity of the farm or rent 8. This, if reserved before the statute of Quia emptores, was a rent service 9; but if created after that statute, it must be either a rent-charge or a rent-seck, according to whether or not it is reserved with a clause of distress 1. The certain and established rents of the freeholders and ancient copyholders of manors, which are of the nature of rent-service, are called rents of assize, because they were assized and certain, and thereby distinguished from such as were variable and uncertain 2. Those of the freeholders are also frequently called *chief* rents³; and both sorts are indifferently denominated quit rents, because thereby the tenant goes guit and free of all other services.

assume it to be granted in fee, in tail, or for life, Lit. sec. 217, 218. 2 Roll. Abr. 423, (B); 18 Vin. Abr. 473. Com. Dig. Rent, (C. 9); and as an assize cannot be had for recovering a rent by a tenant for years, Com. Dig. Assize (B. 5), but only lies for a rent-service, rent-charge, or rent-seck when it is de libero tenemento, 8 Co. Rep. 46, a. viz of an estate of freehold or inheritance; Com. Dig. Rent, (D. 1); Assize, (B. 2); and as the old books state, that if the grantee were never seized of the rent, he is without remedy; Lit. sec. 217, 341; 2 Roll. Abr. 424, (C.); 18 Vin. Abr. 474, (C.); Vaugh. 48; and as seisin cannot be had of a chattel interest, but only a possession, - there may be some question of the soundness of that doctrine." But quære.

⁸ Co. Lit. 143, b. n. (5); ² Inst. 44.

⁹ Spelm. Gloss. voce Feodi-Firma; Terms de la Ley, voce Fee Farm.

- ¹ Co. Lit. 144, a. n. (5); Bradbury v. Wright. Doug, 627, et. not. In the latter case, therefore, it cannot be strictly called a fee-farm rent; which at the present day can be reserved only by the crown. Id.
 - ² 2 Inst. 19.
 ³ 2 Bl. Com. 43.
- 4 When these payments were reserved in silver or white money, they were anciently called white-rents, or blanch-farms, redditus albi; in contradistinction to rents reserved in work, grain, or baser money, which were called redditus nigri, or black mail. 2 Inst. 19; 2 Bl. Com. 42.

Its several kinds.

Copyhold rents are those paid to the lord by the tenants of a manor for their tenements holden by copy of court roll; and as fealty was always incident to this species of tenure, they are in their very nature rent-services⁵.

Besides these several kinds of rents, which have Rents distr been thus fully considered under these their ordinary able of cor and appropriate divisions, there are some few rents of mon right. an eccentric nature, not strictly falling within any of the above denominations. These have sometimes. perhaps not improperly, been classed as a fourth kind of rent, namely, rent distrainable of common right 6. For these rents are not rent-services, because fealty is not incident to them; nor rent-seck, because distrainable; nor rent-charges, because independent of any express clause of distress. Thus, where a rent is granted by one coparcener to another for equality of partition; or to a widow out of land of which she is dowable in lieu of dower; or where a rent is granted in lies of lands upon an exchange—it may be distrained for of common right?. So a rent reserved on a tenancy at will, which is not a rent-service, fealty not being incident to such a tenure, is distrainable of common right⁸. In like manner in a case where there were lord paramount, mesne, and tenant, and by the act of the lord and tenant, to which the mesne was no paty, the rent-service due to him from the tenant was destroyed as a rent-service by coming into the hands of the lord, who could not hold of the mesne. there the rest was considered as still due to the mesne, not as a ren-service, but yet as a rent distrainable of common right 9.

Thus ancietly at common law the remedy of distress was appeable, or not, to the recovery of a rent, according to te particular kind to which such rent

⁵ Laugher v. Humphrey, Cro. Eliz. 524.

⁶ Co. Lit. 141, b

⁷ Lit. sec. 252, 53; Co. Lit. 169, a. 153, a. nte (1).

⁸ Co. Lit. 57, b. 12, a. b. See supra. p. 22, n. (1.

⁹ Lit. sec. 231, 232. Co. Lit. 153, a. and note (1). Bevil's case, 4 Co. Rep. 9 b. Fawkner v. Bellingham, Sir W. Jon. Rep. 234. See also Com. Dig. Rent, (C.) 5.

l Geo. 2, c. ≥8, s. 5. belonged; and so it continued until the passing of the statute 4 Geo. 2, c. 28, s, 5, 1 by which it was enacted, that there should be the like remedy by distress in cases of rents-seck, rents of assize, and chief rents, which had been duly paid for the space of three years within twenty years before the first day of the session in which the act was passed (23rd Jan. 1731), or which should be hereafter created, as in the case of rent reserved upon lease.

Distress now incident to every species of rent.

Distress, therefore, is now incident to every species of rent, either of common right, or by virtue of a charge by deed, or by force of the statute 4 Geo. 2, c 28:—provided in the case of rents-seck, rents of assize, and chief rents, that they have been created since that statute, or that they have been paid during the time, and within the period therein prescribed

Seisin of rent.

It must be mentioned here, that at common lav in order to support a distress for rent, it was necessary, not only that the rent should be properly reserved, or granted, but also that the party distraining hould have a seisin of it; without which there was ao privity between him and the tenant of the land. Therefore before the statute 4 Anne, c. 16, had rendered attornment in future unnecessary, it was requsite upon the grant of a rent-charge, or rent-service, y a common law conveyance², that the tenant should attorn to the grantee, in order to give him a seisn in law of the rent, for without that he could not distain 3. Even this seisin in law was not sufficient to support an assize, or other real action for the rent for which actual seisin in deed by receipt of part of the rent was required 4. This latter seisin was not however, necessary for a distress, because, except a a very few cases, (such as a seisin of encroachnent tortuously

¹ Some few statutory provisions had been previously made enabling particular persons to distrain for rent, who could not before distrain at common law, as 32 Hen. 8, c. 37.

² Where a rent is created

by means of a conveyance to uses, it grantee immediately acquires a seisin by the words of the statute. Dizon v. Harrpin, Vaugh. 44. 3 Cruise Ig. by White, 275.

³ CoLit. 309, 311.

⁴ Lirsec. 235.

Apportionment, &c. of Rent.

by coercion of distress), the tenant was not ed to dispute the actual seisin of his lord in a 5. But since the statute 4 Anne, c. 16, the of seisin with relation to a distress for rent me nearly obsolete 6.

SECTION II.

Apportionment, Suspension, and Extinction of Rent.

a rent is once in being, it is at all times become divided or apportioned, or to be temsuspended, or to be absolutely extinguished rged; and as the remedy of distress must ly depend upon these modifications, it will be portant to examine the doctrine of the appor-, suspension, and extinction of rent, and to low far they apply to the several kinds. hall consider this subject, first, as it regards ice, or rent properly so called; and, secondly, ards rent charged upon land.

service being a consequence of tenure, or a Apportionr compensation given to the lessor or lord for ment, &c. of and occupation of the land demised, his title rent-service. ounded on the principle, that the land is enthe tenant at the hands, and under the proof the lord: therefore, if the tenant be deof the land demised by any act of the lord estroys the tenure, his obligation to pay the

's case, 4 Co. Rep. are, however, some hich it may possibly in question; as in for an ancient renteated before the first . T. 1706; for such ge not being within e of Anne, Long v. 2, 1 Str. 106, and

being excluded in common with all other rent-charges from the provisions of 11 Geo. 2, c. 19, (which entitles a distrainer to avow generally for rent without alleging a seisin thereof), Lindon v. Collins, Willes, 429, Bulpit v. Clarke, 1 New Rep. 56, remains as it was before at common law.

rent ceases; as it would be unreasonable should be obliged to make a return for what not enjoy. Thus if the tenant be evicted o by the lord from the land demised to him, or it purchase the tenancy, the tenant's liability cea as a man is incapable of holding land of the rent will be absolutely discharged of quished 7.

If the resumption or purchase of the lar lord be not of the whole tenancy, but only c tion, or of a particular estate of shorter dura such case, as the tenant will be restored to iovment of the land on the determination of 1 cular estate, or on the performance of the c and his obligation to pay the rent will cons revive, the rent is only temporarily suspended tinguished 8.

Where the lord or lessor purchases the who in part of the land out of which the rent-servithe whole of the rent is not thereby extin but only a proportionate part, and in such rent will be apportioned 9. Because in the case service the tenant is under the obligation of perform to his lord the services due for the la he holds of him; and this obligation continu any part of the land is held by the tenant; f wise the remaining part of the land would be nobody, and freed from all feudal services would formerly have been a detriment to the And as the tenure between the lord and ter tinues for so much of the land as remains unpu the tenant is still obliged to render the servi

fieth a division or pa rent, &c., or a ma into parts;" it has defined, as "frequ denoting division 1 bution, and, in its technical sense, the tion of one subject tion to another distributed." Ex pa 1 Swanst. 338. n.

⁷ Gilb. Rents, 145. 2 Roll. Abr. 489. Smith v. Malings. Cro. Jac. 160. Fishe v. Campion, I Roll. Abr. 234 b. Hodgkins v. Robson, 1 Vent. . 277. s. c. 2 Lev. 143.

⁸ Gilb. Rents, 150. Hodgkins v. Thornborough, Pollex.

^{9 &}quot;Apportionment" in the words of Sir E. Coke "signi-

lord has resumed part of the land, the services ninished in proportion to the quantity of land ed 1.

on this principle, rent-service is capable of ionment at common law on the alteration of the interest²; whether by purchase of part of the y the lord, as already mentioned; or by the accepting a surrender of part of the land from see³; or by the lawful eviction of the tenant me default or wrongful act, as waste or forfeifrom part of the land by the lord ⁴; or by evictitle paramount ⁵, or by the act of God, as,

b. Rents, 152. Where, r, the services are ine, as, the render of a hawk, or such like, e can be no apportionhe whole rent will be ; for the lord by his t shall not discharge f the tenancy, and the whole burden on sidue, for his own advantage, Lit. sec. 3ilb. Rents, 165. Ιf tire service be for the of the public, as castle ornage, &c. the tenant ntinue chargeable for ole, because the public all not be prejudiced private transactions of ties. Co. Lit. 149 a. ents, 166.

scarcely needs to be
that rent reserved on
for years is not aped by the alienation
essee. For the effect
signment by the lessee
whole or part of his
s not to discharge
but to give the lessor
e remedy for his rent;
inst the lessee in ref his privity of con-

tract, and another against the assignee in respect of his privity of estate. Rushden's case, Dy. 4 b. Broom v. Hore, Cro. Eliz. 633. Stevenson v. Lambard, 2 East, 580. In such case, therefore, the landlord may distrain for his whole rent on any part of the land demised. Curtis v. Spitty, 1 Hodges, 153; and see post.

3 Smith v. Malings, Cro.

Jac. 160. Anon. Moore, 114. ⁴ Co. Lit. 148. Stevenson v. Lambard, 2 East, 580. Walker's case, 3 Cro. Rep. 22. 1 Roll, Rep. 331. Moore, 203. But if the lessor tortuously enter upon the lessee, and disseize him of part of the land, there the rent is suspended for the whole (vide supra,) and shall not be apportioned; for this, says Lord Hale, would be for a man to apportion his own wrong. Hodgkins v. Robson, 1 Vent. Hunt v. Cope, Cowp. 277. 243.

⁶ Co. Lit. 148. Doe d. Vaughan v. Meyler, 2 M. & Sel. 276. The establishing of a right of common on land demised is not an eviction of

for example, in case of the encroachment sea 6.

It is evident that whenever apportionmer takes place on the alteration of the lessee's i a suspension or extinction of a part of the rent takes place at the same time; of which, the apportionment is the consequence.

Rent-service is also apportionable on the so of the lessor's reversion, whether by act of law act of the parties; for it is incident to the reand therefore partakes of its divisibility. Thus of law,—where lands demised at an entire rent divided amongst different persons; as, where and leasehold lands are let together at one rapportionment takes place at the death of the amongst the real and personal representative like manner, where a man leases one acre of being is tenure, and another of gavelkind, demise, and having two sons, dies s; and unoiety of a reversion is extended upon a elegit; and where a husband leases for ye serving rent, and dies, and the widow rec

the tenant, as the soil is not recovered. Jew v. Thirkwell, 1 Cha. Ca. 31. Where a lessor professes to grant more than he is entitled to, and the demise is absolutely void as to part, the tenant cannot become subject to the entire rent at any period, and consequently it is not apportionable.

f 1 Roll. Abr. 236. But the casualty, or act of God, must be such as utterly to deprive the tenant of the land; so that if it be merely temporarily covered with water, or burnt by wild fire, &c. no apportionment will take place. Id. The destruction of premises by fire is no ground for the apportion-

ment or extinction (unless by special agr Monk v. Cooper, 2 I. 1477. Belfour v. 1 T. R. 310, 710. Holtpraffell, 4 Taun Ves. 115.

7 Huntley v. Rope
 21. Moody v. Garne
 Abr. 237.

8 Rushden's case, Ewer v. Moyle, Cro. 9 Cambell's case, Abr. 237. Under on any judgment after the commenc the 1 & 2 Vict. c. only a moiety, but is liable, accordin provisions of that s. 11. art of the reversion for her dower 1; in all ases the law apportions the rent in the same as it disposes of the reversion. The same 3 produced where the reversion is severed by he parties; as, where the lessor grants part of ersion to a stranger²; or devises it to several 3; or where the tenant upon performance of tion, or otherwise, acquires the reversion in the land: in all these cases, as a proportionate the rent passes immediately with the reverincident to, and severable like it, without any mention being made of it in the grant, &c., onment necessarily ensues 4. In the same , by a severance of the reversion, the apment of rent-service followed the operation of tute of Quia emptores; which expressly prohat when a tenant sold a part of the lands ne held of his lord, the feoffee should hold it ord, charged with the services for so much as ined to the parcel sold 5.

apportionment can take place where a renthas been so reserved, that the tenant never

oll. Abr. 237. Lit. 148, a. West v. Cro. Eliz. 851. and Harding's case, .ep. 57. Gilb. 173. s v. Watkin, Cro. ,651. Ewer v. Moyle, z. 771. may be mentioned it in cases of apport of rent taking place severance of the rethe amount to be the tenant to each of ral persons amongst he apportionment is ust be settled by a less agreed upon by es; and any apport made between the s, without the tencurrence, will not be

binding upon him, nor transfer to the apportionees the rights and remedies which they would acquire under an apportionment settled by a jury. Bliss v. Collins, 5 B. & Ald. 876. s. c. 1 D. & Ryl. 291. But it seems, that where the apportionment takes place on the alteration of the lessee's interest the landlord may make the apportionment on his own responsibility: if he distrain for too much, he may recover the just sum due on a replevin being brought. Stevenson v. Lambard, 2 East, 575. 2 Inst. 503. See also the argument in Neale v. Mackenzie. i M. & W. 754. ⁵ 28 Edw. 1, c, 2.

became liable to payment of the whole amou that would be to divide an entirety which existed. Thus, where a lessee of a hundre on his entry found eight of the acres in the poof a prior lessee of the same landlord for a tending beyond the duration of his own lease, held, that the latter lease was wholly void as eight acres, and the rent not apportionable ⁶.

There could be no apportionment at comm in respect of time?: therefore if a lease determine the legal time of payment, as by the at the lessor tenant for life, no rent whatever we neither the representatives of the lessor, remainder-man or reversioner being entitled cover it. Even at present there is no rendistress in such case; so that the statutory pron the subject 8 do not come within the range present work.

present w Rent-c

apportionnent &c. of ent-charge. Rent-charge is governed by very differer from those which regulate the apportionme pension, and extinction of rent-service. I grants of rent-charges, as we have seen, I their origin of no benefit to the public, and affor additional strength or protection to the ke but on the contrary tending to lessen the ability to render the feudal services, the lathe earliest period has carried them into exect far only as they take effect strictly accordin original intention of the particular grantor instance: therefore, wherever the grantee own act, as regards the land, prevents the of the grant according to its original intent whole grant determines 9.

⁶ Neale v. Machenzie, 1 M. & W. 747, on error in the Ex. Ch. reversing the judgment in s. c. 2 C. M. & R. 84. See also Gardiner v. Williamson, 2 B. & Ad. 336.

⁷ Clun's case, 10 Co. Rep. 128. Barwick v. Foster, Cro. Jac. 227. s. c. Yelv. 867. Price v. Williams, Cro. Eliz. 360.

⁸ Apportionment in respect of tin remedy by action for covery, takes place statute 11 Geo. 2, c. and the late act 4 & c. 22.

⁹ Gilb. Rents, 1. Lit. 147, b.

if a man has a rentcharge issuing out of lands, and purchases any part of them, all the extinct 1. And where a rentcharge issues out e acres, and the grantee releases all his right in e, the whole is extinguished 2.

ther cause of extinction is a release of the rent v the grantee. And in like manner it may be ished by the act of God; for if the grantee of harge in fee die without heirs, it will sink into d, and the tenant will hold the land discharged rent, as it cannot belong to any one by es-

sec. 222. Sir E. res, as part reason, rent is entire, and out of every part of ; Co. Lit. 147, b. but 1 argument would equire the extinction -service in a like case. : cause seems to be, re is no connexion between the grantor tee, and rent-charges ciently so opposed to right, the law was to seize on every posasion to extinguish

ses, therefore, where itee wishes to purrt of the land, and eserve the rent-charge itire or in part, it is y on the purchase to ew clause of distress grantor of the rent. the residue of the h the amount; which ect the creation of a ıt. Co. Lit. 147, b.

7in. Abr. 504. Several is means have there-1 devised in practice to effect the object of exonerating part of the lands. The common mode has been for the grantee of the rent-charge to join in the conveyance of the lands, which operates as a release of the lands conveyed from the payment of the rent-charge, and to insert a proviso in the deed, that the other lands, shall continue subject to the rent-charge. 3 Cruise Dig. by White, 301. This new grant, however, would be subject to any incumbrances which might have been created subsequently to the original rent-charge. Another mode is, to obtain a covenant from the grantee of the rentcharge, that he will not distrain or enter on the premises conveyed; but there exists considerable doubt whether such a covenant would not operate as an extinction of the whole rent. Butler v. Monnings, Noy, 5. Deux v. Jefferies, Cro. Eliz. Amb. 252. Touchstone, by Preston, 345. 8 Byth. & Jarm. Convey. 506. 6 Id. 410. 3 Attorney Gen. v. Sands, Hard. 496.

Rent-charge is also liable to be suspended for a time, and may afterwards revive. Thus, where a man seized of a rent-charge for life took a lease of the land for five hundred years, and entered; and afterwards, before the rent-charge was in arrear, surrendered the term to the lessor, and then distrained for the rent; it was held, that by such surrender the lease was absolutely gone and extinguished, as between the parties, and therefore that the rent revived; although it would have been otherwise as against those who were not parties to the surrender 4.

Apportionment of rent-charge takes place either by act of law, or by act of the party; but with this distinction.—that where it arises from the act of law, it may be either by severance or alteration of the rent. or by alteration of the interest in the land out of which it issues; but where it follows from the act of the party, it can only be from an alteration of the rent itself. For we have already seen, that where the grantee by his own act, as regards the land, prevents the grant from taking effect according to the original intention, the whole rent is extinguished; but with the rent itself he is at liberty to do what he likes. Thus apportionment takes place by act of the party, where the grantee of a rent-charge releases part of the rent to the tenant, for it will be extinguished in part only, and the part not released will still continue⁵. So if he convey part of it to a stranger, such disposition will not operate as an extinction, but the whole will be apportioned, because this makes no alteration of the original grant; the whole rent is still issuable out of the whole land. and charged according to the original intention of the grantor 6. A rent-charge may be apportioned by act

its original creation was entire; but formerly this was in his own choice, as his attornment to the grantee of the part was requisite. Gilb-Rents, 164. Wotton v. Shirt. Cro. Eliz. 742. Since the

⁴ Peto v. Pemberton, Cro. Car. 101.

⁶ Co. Lit. 148, a. Gilb. Rents, 163. 18 Vin. Abr. 504.

⁶ It is true that the tenant becomes liable to two distresses for a thing, which in

of law, either by severance of the rent, as where part of it was extended by a scire facias 7; or by alteration of the interest in the land out of which it issues, as where part of the land subject to a rent-charge descends to the grantee; for in this case he is perfectly passive, and does not concur by any act of his to defeat the intention of the grant 8. Thus where a man had a rent-charge, and his father purchased part of the tenements charged in fee, and died; and the part so purchased descended to the son, who had the rent-charge; now this charge was apportioned according to the value of the land, because it came to the son by act of law 9. So, if the father be grantee of a rent, and the son purchase part of the land charged, and by the death of the father the rent descend to the son, such rent shall be apportioned. And so it is, if the grantee assign the rent to the tenant of the and and a stranger jointly, the rent is extinct but for 1 moiety 1.

In some cases, where by the act of the party a ent-charge would be extinguished, yet, by the act of aw, it will not only be saved from extinction, but be reserved entire from apportionment. As, when a nan grants a rent-charge out of two acres, and afterwards the grantee of the rent recovers one of the icres against the grantor by title paramount, the whole rent will issue out of the other acre; but if it were a covenous recovery by a feigned title, the whole rent would be extinct, for then he would claim under the grantor 2. And yet in some cases a rent-charge is not wholly extinct, even where the grantee does claim under the grantor. As, if B. lease one acre to A. for life, and A. being seised of another acre in fee grants a rentcharge to B. out of both acres, and commits waste in the acre which he holds for life, so that B. recovers from him that acre for the waste

necessity of attornment has been taken away, the doctrine of the apportionment of a rent-charge has not altered.

Wotton v. Shirt, Cro.

Eliz. 742. Gilb. Rents, 165.

⁸ Gilb. Rents, 1561.

⁹ Lit. sec. 224.

¹ Co. Lit. 149, b.

² Co. Lit. 148, b.

committed; the whole rent is not extinct, but she apportioned, although B. claims this acre under It being so held, in order to prevent the lessee fregaining the advantage of extinguishing rent by lown waste and forfeiture 3.

It will be proper to mention here a distincti which exists between the apportionment of rent-char and that of rent-service. It was lost sight of in modern case 4, since overruled. The distinction is thi -If a man grant a rent-charge in part out of a large estate than he is entitled to, his heir who represe him shall not afterwards take advantage of the wro to set aside his ancestor's grant, or any part of whereas if he reserve a rent-service in such a case, as it is reserved out of the whole land, and it is n sonable that when there is an eviction as to part the land by title paramount, the lessee should I continue to be charged with the whole rent,—it sh on his death be apportioned rateably according to t value of the land 5: thus, if a man be seised of t acres of land, of one in fee-simple, and of the other tail, and by deed grant a rent out of both in fee, tail, or for life, and die, the land entailed is discharge and the land in fee-simple remains charged with t whole rent: which is taking it most strongly again the grantor. But if he make a gift in tail, or a let for life, or years, of both acres, reserving a rent, a die, and the issue in tail avoid the gift or lease, t rent will be apportioned.

Conclusion.

Such are the fundamental principles regulating t doctrine of the apportionment, suspension, and e tinction of rents;—and these, united with the rul which govern their reservation or grant, determing enerally in what cases the lord or lessor, or t grantee is entitled to distrain, and also the quantity of rent which he may recover.

But as it is of importance in the first place to a

4 Rees d. Parkins v. Phillip,

³ Co. Lit. 148, b. But Wight, 69. see Harg. note 147, Id. ⁵ Co. Lit. 148. b.

Persons entitled to distrain for Rent.

certain with the greatest exactness the right of the party exercising the remedy of distress, we shall with this view proceed in the next chapter to treat severally and practically of the different estates or interests which may be had in rents, and of the persons who are entitled, in respect of their estate or interest, to distrain.

We shall then consider what persons are liable to have their goods distrained, and who are exempted from liability: and in a subsequent chapter we shall return to a more minute and practical examination of the amount of rent for which a distress may be made⁶.

CHAPTER II.

OF PERSONS ENTITLED TO DISTRAIN FOR RENT; AND OF PERSONS ON WHOSE POSSESSION SUCH DISTRESS MAY BE MADE, AND WHOSE GOODS MAY BE TAKEN.

Sect. 1. Of persons entitled, in respect of their estate or interest, to distrain for rent.

Sect. 2. Of persons on whose possession a distress for rent may be made, and whose goods are liable thereto, or exempted therefrom.

SECTION I.

Of persons entitled, in respect of their estate or interest, to distrain for rent.

RENT may be reserved or granted in fee simple, fee- What estate

See post, p. 108.

¹ A rent-service in fee, or fee-farm rent, cannot be new-ly reserved by a subject since the statute of *Quia emptores*,

see ante, p. 30, but a rent reserved on an alienation in fee may be charged upon the land.

nd interests hay be had in rent. tail,² for life, or years; it may be limited in possession, remainder, or reversion; it may be held in severalty, coparcenary, joint-tenancy, or tenancy in common; it is subject to the curtesy, and to dower;—in fine, it may be said, in general terms, to be susceptible of the same modifications of estate and interest, and to be liable to the same incidents,³ as the land itself out of which it issues.

In considering these several estates and interests in rent with respect to the remedy of distress, it will be necessary in some instances to refer to the estate or interest of the lessor or grantor in the land itself, in order to ascertain the practicability and validity of the grant or reservation. The present inquiry, therefore, is one of considerable extent, and necessarily micellaneous in its form. We shall, however, endeavour to observe such order in its several branches as the nature of the subject will admit.

loparceners.

Coparceners, before partition, are considered in law as but one heir,⁴ and therefore they cannot have several distresses for a rent held in coparceny. They may either join in making a distress, or one coparcener may distrain alone for the whole rent,—each having an estate in every part of it. In the event of a replevin, however, the avowry must be according to the nature of the estate, joint; or the party distraining alone must avow in her own right, and make cognizance as the bailiff of the other coparceners. No consent from the other coparceners need be previously obtained in order to authorize one coparcener to distrain alone, or alone to appoint a bailiff to distrain, for the whole rent.⁵

² Rent-charges are within the statute *De donis*. The distinction between a rent limited to a person and the heirs of his body, and an estate in land limited in the same manner, does not come within the range of the present work.

³ A rent-charge cannot escheat, but sinks into the land.

see ante, p. 39.

⁴ Co. Lit. 163, b.
⁵ Leigh v. Shepherd, 2 B.
& B. 465. s. c. 5 Moore, 297.
Stedman v. Bates, 1 L. Raym.
64, s. c. Stedman v. Page, 1
Salk.390; 5 Mod. 141. There is no express decision as to the effect of a positive dissent to the distress by one: see Leigh v. Shepherd; Robinson

partition coparceners are entitled to distrain y for their respective shares: and the above : applies as well to a rent-charge as to a rent-

re upon partition between coparceners a rent, out of the lands descended,7 is assigned to equality of partition, such rent is distrainable non right,8 whether in the hands of the coparr of her grantee, for it is annexed to the

tever rent accrues to coparceners as such, that v, whatever rent they are jointly entitled to in se of coparcenary, partakes of the nature of their and is subject to the same rules of distress. f there be three coparceners, and they make n, and one of them grant an annual rent out of t to her two sisters and their heirs for equality tion, they shall have this rent in the course of So if two coparceners by deed inalien both their parts in fee, rendering to them d their heirs a rent out of the land, they are nt-tenants of this rent, but shall have it in cory, because their right in the land out of t issues was in coparcenary.2

coparcener cannot be deprived of her rights ortuous acts of another; and therefore if there coparceners entitled to a rent, and one of them the tenant of the land, the other may still

i for her moiety.3

uan, 4 Bing. 562, s. c. P. 474. 3 C. & P. 234. the text-writers seem overlooked the judg-Leigh v. Shepherd, still lay it down that s by coparceners must

Lit. 164, b. 169, b. Lit. 169. sec. 252, 253; and . (1.) on Co. Lit. 153, lso ante, p. 31. ler and Baker's case, ep. 22, b.

¹ Stukely v. Butler, Hob.

² Co. Lit. 169, b. since it was laid down so clearly in the case of Leigh v. Shepherd, (supra) that one coparcener may distrain alone for the whole rent, these considerations bear rather upon the avowry than the distress. They are important, however, as to the amount of rent which may be distrained for. ³ Co. Lit. 148. b.

Where one coparcener has a unity of seisin or possession of a rent and of the land on which it is charged, the law apportions the rent, extinguishing so much of it only as is proportionate to her share in the land: but still the right of distress is restrained for a time. Thus, if a woman be seised of a rent-charge, and afterwards the land charged descend to her and her two sisters in coparcenary; only a third part of the rent is extinct by such unity of estate; but the coparcener who has the rent cannot distrain on the land for the other two parts of the rent, until after partition; because until that time she is seised with her two sisters per my et per tout in the land.⁴

If coparceners join together in any act whereby they entirely depart with their coparcenary estate, as formerly by levving a fine of the rent, even to the use of themselves, it seems that their former estate is so entirely destroyed, that they cannot afterwards distrain for arrears of rent previously accrued.⁵

Co-heirs in gavelkind.

Joint-tenants.

Co-heirs in gavelkind are parceners by custom, and are governed by the same rules with regard to the right of distress, as parceners at common law.

The same rules apply also, for the most part, to joint-tenants; for they, like coparceners, hold by one title, and by one right, and are seised per my et per tout of the rent or land.⁸ Thus it is decided that one joint-tenant may distrain alone for the whole rent; but he must afterwards avow jointly with the other, or in his own right and as bailiff to the other, and account for the respective shares of the rent.⁹ One joint-tenant may also sign a warrant of distress, and appoint a bailiff to distrain for rent due to all, without their consent; and if, when applied to, they merely decline to act, that will not prevent him from proceeding.¹

⁴ Bro. Abr. Dist. pl. 38, 65. Exting. pl. 31.

Dixonv. Harrison, Vaugh.
 R. 52. Vaughan, C. J. contra.
 Lit. sec. 241, 265.

⁷ Leigh v. Shepherd, 2 B. & B., 465. s. c. 5 Moore, 297.

⁸ Lit. sec. 288.

Pullen v. Palmer, 3 Salk.
 207. s. c. 5 Mod. 72. Carth.
 328

¹ Robinson v. Hoffman, 4 Bing. 562; s. c. 1 M. & P. 474; 3 C. & P. 234.

A surviving joint-tenant may distrain for arrears rued in the life-time of his deceased companion.² Joint-tenants cannot in general by their own act ride their estate to the prejudice of others;3 nor n they, by a tortuous act, destroy each other's rights. ad therefore, as in the case of coparceners, if two of em be seised of land, and one disseize the tenant, the her may distrain for his moiety of the rent:4 for is is construed to be a temporary severance of the int-tenancy, and therefore a moiety only of the rent affected by the unity of possession.5

As, in general, joint-tenants cannot destroy the ghts which attach upon the land,6 so they cannot large the land to the prejudice of each other's estate erein. Therefore, if there be two joint-tenants in e, and one grant a rent-charge by deed to a stranger it of his part in the land, such rent-charge is effecal during the life of the grantor, but is void after his cease; and the survivor shall have the whole land scharged of the rent: because the survivor claims e land from the first feoffor, which is by a title ramount the grant of the rent-charge. But if there two joint-tenants in fee, and one grant a rentlarge out of his part, and after release to his jointnant, and die, the survivor shall hold the land larged, because he claims under the release of his mpanion.8

Upon the same principle, if there be two jointnants in fee, and one make a lease for years rerving a rent, and die, the surviving joint-tenant ill have the reversion by survivorship, but shall not we the rent, because he claims the land by a title ramount the lease, namely, from the first feoffor, d therefore is a stranger to the rent⁹.

Joint-tenants may sever the tenancy in several ays; as, by the alienation of any freehold estate in e land, or by voluntary partition at common law,

² 2 Rol. Abr. 86.

³ Vin. Abr. Apport. B. 17.

⁴ Co. Lit. 148. b.

⁵ Id. 188, a.

⁶ This rule has some ex-

ceptions. See Lingen v. Payn.

Bridgm. 129. 2 Inst. 302. 7 Lit. sec. 286.

⁸ Co. Lit. 185, a.

⁹ Co. Lit. 185, a.

or by compulsory partition under the statute Hen. 8, c. 1; but this cannot be done, by a vise in the will of a joint-tenant, for by his death survivorship accrues before the will can take effe The effect of a severance is completely to destroy joint tenancy, and to create several estates in tenants.

Tenants in common.

Tenants in common do not, like joint tenants, h by one title and one right; they hold by differ titles, and have several estates. They are therei entitled to distrain severally, each for his respect share of the rent; but one alone cannot distrain more than his own share. Supposing the shares all to be in arrear, there seems to be no objection their joining in a distress for the whole; but in all ca in the event of a replevin, they are obliged to sever to avow according to their estates, separately.2 Thu is said, that if three tenants in common distrain this beasts, one of them must avow for ten, another ten, and the third for ten more. And in a case wh land was demised by four persons (whose original title did not appear) at one entire rent to be divi and paid separately in equal portions; it was h that a distress by one of the four for her own sh was regular; for whatever might have been the terest of the lessors as between themselves, they w certainly tenants in common as between them their lessee,—that is, they were tenants in comm of the rent,—and entitled each to a separate distre Where the rent consists of an entire thing, as render of a horse or hawk, even tenants in comm must of necessity join, and cannot distrain separate the thing being incapable of division.⁵

Tenants in common are severally entitled to rece from the terre-tenant their several proportions of rent: and therefore where a person holding un

¹ Lit. sec. 287.

⁴ Whitley v. Roberts, M'Clel. & Y. 107. ² Lit. sec. 317. And the cases cited infra. ⁵ Co. Lit. 197, a. Lit. s 314.

³ Pullen v. Palmer, 3 Salk. 207.

wo tenants in common, paid the whole rent to one of them, after having received a notice to the contrary rom the other, it was held that the party who gave the notice might afterwards distrain upon the land for his share of the rent⁶.

It is said by a learned writer, that it seems the purvivor of two tenants in common might distrain for the whole rent due upon a lease, although the reserration was to both according to their respective interests7.

As tenants in common have no original privity of state between them as to their respective shares, one nay lease his part of the land to the other, rendering ent, for which a distress may be made, as if the land ad been demised to a stranger8.

A person may be tenant in fee simple of a rent- Tenants in ervice, or fee-farm rent, created prior to the statute fee. f quia emptores9, and may distrain for it of common ight, as such. But a rent-service cannot now be reerved by a tenant in fee of land on the alienation of is whole estate¹. A rent so reserved at the present ay, with a clause of distress by deed, might be reovered as a rent-charge; and if reserved without any pecific charge, it would be distrainable as a rent-seck rithin the statute 4 Geo. 2, c. 282.

A rent-service may be reserved, or a rent-charge Tenants in ranted, in fee tail; and in either case the tenant in tail. ail of the rent is entitled to recover it by distress,—in he one, of common right, and in the other, by virtue f the clause in the deed.

⁶ Harrison v. Barnley, 5. . R. 246. And see Doe v. Fitchell, 1 B. & B. 11. s. c. 3 Foore, 229. Powis v. Smyth, B. & Ald. 850, s. c. 1 D. & **Ly**l. 490.

⁷ Har. Woodf. Land. & Ten. Vallace v. M'Laren, 1 M. & yl. 516. Sed quære.

⁸ Bro. Abr. Distr. pl. 65.

Hudson v. Snelgar, 2 Rol. Rep. 212. Snelgar v. Henston, Cro. Jac. 611.

^{9 18} Edw. 1.

¹ A fee-farm rent may be reserved, and distrained for as such, at the present day by the crown, see ante, p. 26, 30.

² Harg. note (5) on Co. Lit. 144, a. Eradbury v. Wright, 1 Doug. 627, and note.

Tenants in tail of lands are enabled by 32 Hen. 8, c. 28, to make leases for ar exceeding three lives, or twenty-one years, tain restrictions prescribed by the act; leases are good against the issue in tail³, al against those in remainder. Even if a temake a lease not in conformity to that stabe good as against himself, although su avoided by the issue in tail after his death. In tail has, therefore, a reversion on all lether made in conformity to the statute, of and may distrain, even at common law, freserved, it being a rent-service⁴.

Tenants for life.

On the conveyance of a life-estate out in fee, a rent-service for life may be rewill be distrainable as such at common law of the reversion. In like manner a rent-trainable by force of the clause in the de limited to a person for his own life, or for other person, or for any number of lives cases the grantee of the rent-charge, or the whom the rent-service is reserved, will be life, or pour autre vie, of such rent.

Tenants of land for their own lives, or vie, or tenants in tail after possibility of is have estates of freehold. If they make a amounting to a disposition of their whole serving rent, such rent is rent-service, an entitled at common law to distrain upon the respect of the reversion, which in contellaw belongs to their respective estates. make a grant which amounts to a disposit whole estate, reserving rent, such rent of trainable only as a rent-charge, if reser clause of distress, or as a rent-seck under 4 Geo. 2, c. 28.

By statute 32 Hen. 8, c. 37, s. 4, te

³ The issue in tail being entitled to the rent, and to the same remedies for its recovery as the lessor.

⁴ See the cases a note on Ex pa Swanst. 346.

ie may distrain for arrears due at the death of this que vie, in the same manner as they might one at common law during his life⁵.

usband may be tenant by the curtesy of a Tenant by the rvice, where he is entitled as tenant by the curtesy.

to the reversion of the land out of which it and he may distrain for such rent service of a right. He may also be a tenant by the of a rent-charge, and of a rent-seck, in he wife had an estate of inheritance⁷; and in ases he will be entitled to the remedy of distheir recovery, either by virtue of the clause deed, or under the operation of the statute 2, c. 28.

man may be endowed⁸ of a rent, as well as of Tenant in hether it be rent service, rent-charge, or rent-dower. and her right to distrain will follow the nature ent.

e, that at common ant for life made a 'ears, if he should so it a certain rent payterly, and died berter day, the tenant urged of that quarby the act of God, e, 10 Co. Rep. 128, was entitled to rend the same was any one having a de estate on which epended, died only e the rent reserved ie, per Ld. Hardw. . Gee, ap. 1 Burn Ambl. 198: but medied by statute . 19, s. 15, which tion on the case to ors and administrae recovery of this of the rent. Dig. by White, tit. ?, s. 10. It seems

y be proper to re-

that he will be entitled to be tenant by the curtesy only of a reversion expectant on a lease for years of lands of inheritance of the wife: for a man shall not be tenant by the curtesy of a reversion or remainder expectant upon any estate of freehold, unless the particular estate, be determined during the coverture. Co. Lit. 29, a. But see Harg. note (166) on Id. And as to that note, quære.

⁷ Co. Lit. 29, a.

8 Considerable alterations have been made in the law of dower by the late statute 3 & 4 W. 4, c. 105. These alterations, however, do not affect the subject of the present work.

⁹ Co. Lit. 32, a; but not of an annuity, because that only charges the person, and is not issuing out of lands and tenements. Id. 32, a. 144, b. If a man, tenant in fee, make a lease for years, reserving rent, and afterwards marry, and die, his wife shall be endowed of the third part of the reversion, together with a third part of the rent. For the rent will be apportioned by act of law, and she will hold her third part in severalty, and may distrain for that alone.

If a husband be seized of a rent-charge or rentseck for an estate of inheritance, and die, his widow

shall be endowed of a third part thereof.

If a rent be assigned to a widow instead of her dower, she may distrain for it although she has no reversion, and the rent was granted without deed; for such rent is in its nature independently distrainable of common right.⁴

Tenant in dower holds as in dower all lands assigned to her by the heir in respect of dower, although she were not strictly dowable of them. In like manner she is entitled to hold lands of the hubband taken by her from the heir, in exchange for her dower; and consequently, may distrain in all such lands of common right.

As to the period when a tenant in dower becomes entitled to distrain for rent of which she is endowed or dowable, it may be said, generally, to be after assignment and delivery made to her by the heir, or by the

⁵ Co. Lit. 34, b.

¹ Co. Lit. 32, a. 1 Roll. Abr. 678. pl. 7. 8. Stoughton v. Leigh, 1 Taunt. 402.

² Lit. sec. 36.

³ Lord Coke says also, that if a man make a gift in tail, reserving a rent to him and his heirs, and after marry, and die, his wife will be dowable of this rent, because it is a rent in fee, and may by possibility continue for ever. Co. Lit. 32, a. But this doctrine appears inconsistent with the rule, that no right of dower attaches upon a reversion or remainder expectant on a particular estate of freehold;

Co. Lit. 29, a; Burton's Comp. pl. 354; supra p. 51, n. 6; for the rent is inddent to the reversion; Lit. sec. 215. 346; Co. Lit. 143, a. 214; Sacheverell v. Frogate, 1 Vent. 161; ante, p. 26, 7; and when a woman is entitled to dower out of a rent-service, as in the above case of a least for a term of years, it is because she is dowable of the reversion that she takes the rent as incident to it. Stoughton v. Leigh, 1 Taunt. 410. ⁴ Co. Lit. 169, b. 34, b. ante, p. 31.

. In some cases the time depends upon the nature dower itself. For when a woman is endowed of g certain, as in the case of dower ad ostium z, or ex assensu patris, she may enter immediin the death of her husband, without any subt assignment. And even at common law. the tenant in dower by her writ demanded r rent in certain, she might distrain after judgand before seisin delivered to her by the on the habere facias seisinam. But where the is not demanded in certainty by the writ, as the writ is in respect of a rent-charge of six 3, and she has judgment to recover the third Ithough it be certain that she shall have forty es, yet she cannot distrain until delivery by eriff. And so if the widow of one tenant in on demand the third part of a moiety, she enter or distrain on the part recovered after ent, until it is delivered to her by the sheriff; zh such delivery cannot reduce it to more certhan it had before.7

woman may be entitled to part of a rent as Tenant by in dower at common law, so she may have it freebench. free-bench by custom out of copyhold tenure. there a copyholder in fee (there being a custom ridow's estate) made a lease by licence, reservnt to himself and his wife during their lives, his heirs, it was resolved, that the wife should he rent after her husband's death; with, it a power of distress as for other copyhold

int-service or rent-charge9 may be reserved or Tenants for d for any number of years, and will be disterms of years. le accordingly.

ssee of land for term of years who grants an

ver ad ostium ecclesias assensu patris, after been in disuse for ears, were finally abow statute 3 & 4 W. 4,

Lit. 34, b.

8 Sacheverell v. Frogate, 1 Ventr. 163. Laugher v. Humphrey, Cro. Eliz. 524. Com. Dig. Rent, B. 5. 9 As to rent-seck for term of years, see ante, p. 29, and infra.

ा का स्टब्स से पार केस्स That is two present less to Land of the Cartes in South one mail in such in teruplate a Erec The last of the same a reserved. and the second s n- vm. - emet min t Thus The see Milit him to the interior of the seed of early or the property has a and the same of th on who is a segment of mile on and the size of proper so reserved IN THE ASSESSMENT AND ADDRESS OF THE PARTY O merces assess of held for terms (, and it is not the interest to be of the in the contract that statute, and d er ar and a real most persial extention. or you is with the man and the instance w the con right, nor The same cases mot to the house it making a distress (

N. P. M. L.

has an estate of freehold in lands, the immeersion of such as are in lease is not in the alone, but in the husband and wife in right ife, and it seems, that when a distress is respect of such reversion, it may be joint to the nature of their estate therein, wherent accrue before or after the coverture.6 re the reversion is a chattel real, as if a cossessed of a term for twenty years, before lease for ten years, the husband may, e coverture, vest this chattel in himself, by it into possession, and in that case should distrain alone for the rent. Indeed, in a cases, not only where the reversion has attel interest, but even where it has been of of freehold and inheritance in the wife, the re considered the rent itself to be so much ture of a personal chattel belonging to the as to hold, that the husband may not only ut even avow for it alone.8 So that it may, e safely laid down as a general rule, that t due in right of the wife, the husband may one,9 even if it accrue to her in autre droit ix or administratrix.1 dering more minutely the application of the r arrears of rent accruing in right of the r the various contingencies which may ocist observe this distinction between rent due which the wife has only a *chattel* interest: ue for land, in which she has an estate of And in some cases, the further distinction made, between rent accruing before, and ing after the coverture.

vowry. pl. 70.

Wyard, 2. Bulstr. 1 Rol. R. 52. 1. Poore, Cro. Jac.

^{7.} Poore, Cro. Jac. 7. Bellent, Id. 442. Walleeden, 1 Mod. 1V. Palmer, 3 Salk.

⁹ Osborne v. Wickenden, 2 Saund. 195. and the cases last cited.

¹ See Yard v. Eland, Ld. Raym. 369. Wankford v. Wankford, 1 Salk. 306. Anherstein v. Clark, 4 T. R. 617. Parry v. Hindle, 2 Taunt. 181.

First, With respect to rent due for land in which the wife has only a chattel interest, it seems that the husband may at any time, during the coverture, distrain for the arrears due before or after the marriage. And if he survive, as the whole chattel will then vest absolutely in him, he may in that event distrain for all the arrears, whether due before or after marriage. But if the husband die without reducing a chattel real of his wife into possession, it survives to her, and the arrears of rent, whether accrued before, or during coverture, do not belong to the executors of the husband, but go, with the reversion, to the wife surviving, and may be distrained for by her accordingly.

Secondly, With respect to arrears of rent accruing on land in which the wife has a freehold interest, the husband's right at common law depended upon their accruing during the coverture; for if they accrued before it, the husband surviving was not entitled to them, but they belonged to the personal representative of the wife, who might have sued for them in an action of debt.4 If they accrued during the coverture, and the husband survived, it was held, that then they belonged to him, and that he might bring debt for their recovery: but if the wife survived, then such arrears belonged to her, and did not go to the executors of the husband. These rights of the husband. however, were materially enlarged by the statute 32 Hen. 8, c. 37, s. 3, which provides that, if a man has a freehold interest in right of his wife in any rents or

² See Co. Lit. 46, b. 300, a. 351, a.

³ Co. Lit. 351, a. 1 Roll. Abr. 350. Contra. Anonymous. Moore, 7. But this last

case does not seem to be law.

If any act be done by the husband in his life-time, to reduce into possession the chattel real of the wife, her future interest (if any) in the rent depends upon whether

such reduction were partial or total; for a disposition of part of a term, is not a reducing into possession of the whole. Blaxton v. Heath, Poph. 145; Co. Lit. 46, b. Harg. note (277) on Id.

⁴ Ognel's case, 4 Co. Rep. 51, a.; Co. Lit. 162, b.; but see *infra*, p. 57, n. 6.

⁵ Id. and Co. Lit. 351.

by Lord of a Manor.

fee-farms, and the same be unpaid in the wife's life, then the husband, after the death of his wife, or his executors or administrators, may have an action of debt against the tenant, or his executors or administrators; and also that the husband after the death of the wife may distrain for such arrears, in like manner as he might have done, if his wife had been living. This statute, therefore, gives the husband a remedy by distress (or by action of debt) for the arrears accrued before the coverture, for which previously he had no remedy at all; and gives him the additional remedy of a distress, for the arrears accrued during the coverture, for which, at the common law, he could have had only an action of debt.⁶

Whatever rent is payable to a lord of a manor in Lord of a respect of his seignory is a consequence of tenure, manor, and is therefore a rent-service distrainable of common right.

A lord of a manor may also become entitled to dis-taking by train by reason of escheat: for where a tenant of a escheat. manor grants a lesser estate than his own, keeping the reversion in himself, such reversion, as part of his tenancy, is liable to escheat to the lord. Therefore if a tenant lease for life, rendering rent to himself and his heirs, and die without heirs, so that the reversion escheat to the lord, and afterwards the rent be in arrear, the lord may distrain; for the rent is incident to the reversion, and goes with the reversion into the hands of the lord.

The lord of a manor may, of common right, distrain for his copyhold rents; for to this tenure

^{*}Ogne? s Case, 4 Co. Rep. 51, a. This proposition is true only as regards the husband, strictly as such; for he was previously able as her administrator to acquire an interest in arrears of rent accrued, even before the coverture.

It will be observed that the remedy of distress given by

the statute 32 Hen. 8, c. 37, is confined to the husband; and the remedy by action only is extended to his executors and administrators.

⁷ Vin. Abr. Escheat, C.

⁸ Lit. Sec. 348.

⁹ Co. Lit. 215, b.

¹ Laugher v. Humphrey, Cro. Eliz. 524.

fealty is incident, and therefore such rent is in its very nature rent-service.² The lord may distrain for it not only on the copyholder himself, but also on his lessee, the lands being chargeable in the hands of any one claiming under the copyhold tenant:³ but they are not chargeable in the hands of a new tenant admitted to the copyhold, for arrears due from his predecessor.⁴ If the lord part with his manor, all privity of estate between him and the copyhold tenants is destroyed, and therefore he cannot afterwards distrain for arrears of rent previously incurred.

Copyhold rents are not within the statute 32 Hen. 8, c. 37,5 giving a remedy by distress for arrears of rent to executors and administrators.6

They are within the statute 4 Geo. 2, c. 28, s. 5.7

Whenever on a grant of lands, of which the grantor is seized of an estate of inheritance, a rent-service is properly reserved specifically, or is reserved generally during the term, all the rent which becomes due, even but an hour, after the ancestor's death, shall go with the reversion (as incident thereto) to the heir: indeed, as we have already seen, rent-service cannot be reserved to a stranger; so that although it were expressly reserved to the lessor, his executors and assigns, on a lease or grant of lands for a particular estate out of an estate of inheritance, the executors could not have it, because strangers to the reversion which is an inheritance.

In like manner, whenever a man is seized of a rent-

Heirs.

² See ante, p. 31.

³ See next sect. as to whose goods are liable to be distrained for rent.

^{4 2} Watk. on Cop. 180.

⁵ As to this statute, see infra, p. 63.

⁶ Appleton v. Doily, Yelv. 135. Bull. N. P. 57. Sands v. Hempston, 2 Leon. 142. See 1 Scriv. on Cop. 107, and n. (a), with the authorities there cited. See also 2 Wms. on Ex. 608, and n. (c).

⁷ 1 Scriv. on Cop. 103. 2 Watk. on Cop. 181, 2, 191. And see n. 150 to Watk. Gilb. p. 468. Fisher, 138. As to the statute 4 Geo. 2, c. 28, s. 5, see ante, p. 31, 32.

⁸ As to when rent becomes due, which in this respect, amongst others, is a question of great importance, see post,

⁹ Co. Lit. 47, a. And see the references in the next note.

charge, or of a rent-seck, for an estate of inheritance, his heir is entitled to all rent accruing after his decease.

In all these cases, whether the heir be the heir of tenant in fee-simple, or fee-tail, or whether he take by descent at common law, or by custom, the right of distress follows the nature of the estate in the land or in the rent. So that, it is always necessary, in order to determine when the heir shall have a rent, and a power of distress for its recovery, to consider the terms of the grant or reservation, and the nature of the ancestor's estate, either in the rent, or in the reversion of the land out of which it is reserved.¹

Where rent is reserved payable at either of two periods, at the election of the lessee, as at the feast of St. Michael or within one month after, if the lessor die between them, the heir shall have the rent; because it was not in arrear till after the last period limited for its payment, and could not be distrained for till after that day had expired.²

The heir, when entitled to a rent in right of the reversion, is also entitled to all its incidents; and therefore a nomine pænæ (that is, a penalty to oblige the tenant to a punctual payment of the rent,) will descend to him.³

Apportionment of a rent-service often takes place on descent. Thus, if a man seized in fee of one acre of land, and possessed of another acre for a term of years, make a lease rendering one entire rent, and die; whereby the reversion of one acre goes to the heir, and of the other to his executors; the rent accruing subsequently will be apportioned between the

¹ As to reservations of rentservice, and the construction of such reservations, see Cother v. Merrick, Hard. 91. Stafford's case, Dyer, 252. Oates v. Frith, Hob. 130. Randall v. Jenkins, 1 Mod. 110. Sacheverell v. Frogate, 2 Saund. 367, and notes, where all the authorities are

collected. See also Com. Dig. tit. Rent, B, 5, and ante, p. 24, et seq.

² Pilkinton v. Dalton, Cro. Eliz. 575. Clun's case, 10 Co. Rep. 127, a. Anon. 2 Shower, 77.

Co. Lit. 162, b. Gilb.
 Rents, 144. Bendloss v.
 Phillips, Cro. Eliz. 895.

heir and the executors, and they may distrain severally for their respective shares.4 So if he be seized of two acres, the one in fee, and the other in borough-English, and have issue two sons, and lease both acres for life or years, rendering one entire rent, and die; in this case also, the reversion and rent will be divided.5

Executors and

A distress for rent by executors and administrators dministrators. must be considered, first, with regard to rent accruing subsequently to the testator's or intestate's death; and, secondly, with regard to arrears of rent previously due.

First, as to a distress for rent accruing subse-

quently to the testator's or intestate's death.

A rent-charge not of inheritance will go, on the testator's or intestate's death, to the executor or administrator, together with the remedy of distress for

the recovery of all rent accruing afterwards.

Also all leases and terms of lands, tenements, and hereditaments, of a chattel quality, being chattels real, will go to the executor or administrator. So that, if a lessee for years make an under-lease, reserving rent, and die, the reversion, and all rent accruing after his decease as incident to it, will go to his executor or administrator, and not to his heir; even though the reservation were to him, and his heirs during the term, without mentioning the executor.6 For this rent-service the executor or administrator may of course distrain at common law in right of his reversion. In like manner he may distrain for

Huntley v. Roper, Anders. 21. Lee v. Arnold, 4 Leon. 27. Harding's case, Godb. 139, pl. 169.

⁴ Gilb. Rents, 188. Moodie v. Garnace, 3 Bulst. 153. s. c. Moor, 848, pl. 1151. 1 Roll. Rep. 330, 367. Wood v. Germons, Cro. Jac. 390. See ante, p. 36, 59.

⁵ Dumpor's case, 4 Co. Rep. 120, b. Co. Lit. 215, a. See also on the subject of apportionment by descent, Rushden's case, Dyer, 5, a. Ewer v. Moyle, Cro. Eliz. 772.

⁶ Sacheverell v. Frogate, 2 Saund. 371, n. 7. 'If in such case the words "during the term" were not used, the rent on the lessor's death would sink into the land. Co. Lit. 47, a.

reserved to himself on his making an undera term of years of the deceased.⁷ nave already seen that where a man seized of te of inheritance in lands makes a lease saving ersion, and reserves a rent expressly to himself, cutors, and assigns, the executors cannot have g strangers to the reversion, which is an inheri-

in a like case where no reversion is left in the and a rent is reserved to his executors, admiors, and assigns, it will go to them, and not to ir:9 for there is no reversion left in the asto which the rent can be incident, so as to it to the heir: the rent is not a rent-service. ent-seck, which may well be reserved to the ors. 1 So, where a rent-service reserved by a in fee on a lease for years is reduced to a rentbeing subsequently severed from the revermay then go to executors or administrators, zh the reversion of the land out of which it goes to the heir: thus, where a man seized of n fee made a lease for years, reserving rent, terwards devised the rent to a stranger and and the stranger was seized of the rent and t was held, that the executors of the devisee have this rent, and not his heir; although, if never been devised, it must have gone to the the devisor with the reversion.2

1 such case the execuadministrator reserve t to himself, his exe-&c. it has been held s executors, and not ministrator de bonis ill have the rent; but, to have been thought y that they could not v distrain for it. 2 on Ex. 609. Drue v. Freem. 392, 403, s. c. .00. 1 Vent. 275. 3 8, 427, 463, 495, 549. ent, however, the exexecutor should seem

to be within the statute 3 & 4 Will. 4, c. 42, ss. 37, 38. See post p. 64.

8 See supra p. 58, and n. 9.

⁹ 3 Cruise's Dig. 321, 3rd edit.

¹ Jenison v. Lexington

(Lord), 1 P. Wms. 555.

² Knolle's case, Dyer, 5, b.

Ards v. Watkin, Cro. Eliz.
637, 651 s. c. Moor, 549.

By a devise of the rent the land itself would pass, unless a contrary intention appeared.

Kerry v. Derrick. Cro. Jac.

In some cases it is apparent that the executor or administrator will be entitled only to an apportioned part of an entire rent; as, where a testator demises freehold and leasehold lands together at one entire rent, an apportionment takes place at his death amongst the personal and real representatives.⁸

Secondly, as to a distress for arrears of rent due at the death of the testator.⁴

There is but one case in which an executor or administrator can distrain, at common law, for arrears of rent accrued due in the testator's or intestate's lifetime; and that is in the case of the reversion of a chattel real, expectant on a particular estate for years, together with the rent-service incident to it, vesting in him. As, where a lessee for fifty years underlets for twenty years, reserving rent, and dies during the latter term, the rent and reversion, as we have seen, will vest in his personal representative, who may then distrain, at common law, for the arrears of rent that became due in the life-time of the deceased; because these arrears were never severed from the reversion, but the executor or administrator has the reversion, and the rent annexed thereto, in the same manner as the deceased himself had it; and it is not like the case of a reversion which goes to the heir, whilst the arrears, as personalty, belong to the executor or administrator.⁵ But if the testator by his will specifically bequeath his reversionary interest in the term, the executor can distrain, at common law, only before his assent to the legacy, as the reversion will thereby vest in the legatee, and being thus divested out of the executor, by his own assent, he can no longer distrain for the arrears.

At common law, neither the heirs nor the personal representatives of tenants in fee, fee-tail, or for life of a rent-service, rent-charge, rent-seck, or fee farm rent could distrain for arrears incurred in the life-

^{104.} Maundy v. Maundy, 2 Str. 1020. Allen v. Backhouse, 2 Ves. & B. 74.

³ Ante, p. 36, 59.

⁴ As to when rent is in ar-

rear, and, as such, will go to the executor, see post, c. 4. ⁵ Wade v. Marsh, 1 Roll. Abr. 672, tit. Distress, (0.) 13. s. c. Latch, 211.

the owners of such rents.⁶ But it is by 32 Hen. 8, c. 37, s. 1, that the executors inistrators of every such person, to whom a rent or fee farm shall be due and not paid ime of their deaths, may distrain upon the arged with the rent, and chargeable to the of the testator, in like manner as the testator might have done in his life-time, so long as as remain in the possession of the tenant in who ought to have paid the rent or fee of any other person claiming by and from purchase, gift, or descent.⁷ on 4 of the same statute enables the executors of tenants are sufficient and sufficient and sufficient are sufficient as a small so

on 4 of the same statute enables the executors unistrators of tenants per autre vie, as well as nants themselves, to distrain for the arrears he death of the cestui que vie upon the lands ements out of which rents or fee farms issue, ame manner as the tenants per autre vie might ne during the life of the cestui que vie.

statute has been considered as a remedial law, been decided to extend to the executors and trators of all tenants for life, as well tenants r own lives, as tenants per autre vie.8

executors and administrators of persons entirent-charges for terms of years are clearly nin the statute, for they are not tenants in fee, or for life of such rents.⁹ But whether, if n seized in fee demised land for years, rerent, his executors or administrators could after his death for arrears of rent incurred life-time, is a point which has been much ad,¹ without being satisfactorily settled, till a

Lit. 162, a.
ion 2. of the statute
from its operation
Wales, the tenants
had been accustomes
sum of money to the
redemption of the

l v. Bell, L. Raym. . 3 Salk. 136. See

Co. Lit. 162, a. 162, b. and Harg. notes 298, 299, on Id. 9 Turner v. Lee, Cro. Car. 471.

¹ Renvin v. Watkin, MSS. cited 1 Selw. N. P. 678, 9th ed. Crockerell v. Owerell, Holt, 417. Powell v. Killick, MSS. cited 1 Selw. N. P. 678, 9th ed. Bull. N. P. 57. Meriton

recent case² (in which the court took time to consider) decided that such a rent was not within the statute. and induced an alteration of the law in this respect by a subsequent enactment. So that now by the statute 3 & 4 Will. 4, c. 42, ss. 37, 38, it is enacted, "that the executors or administrators of any lessor or landlord may distrain upon the lands demised for any term, or at will, for the arrearages of rent due to such lessor or landlord in his life-time. in like manner as such lessor or landlord might have done in his life-time; and that such arrearages may be distrained for after the end or determination of such term or lease at will, in the same manner as if such lease had not been ended or determined: provided that such distress be made within six months after the determination of such term or lease, and during the continuance of the possession of the tenant from whom such arrearages became due; and also provided that all and every the powers and provisions in the several statutes made relating to distresses for rent, shall be applicable to the distresses so made."

In all cases, therefore, at present, where the testator or intestate was seized of a rent of any kind. either in fee-simple, fee-tail, or for life, his executors or administrators may distrain for the arrears incurred in his life-time, under the operation of the statute 32 Hen. 8, c. 37; and for all arrears of rent-service incurred in his life-time on a lease for years, or at will, they may distrain under the statute of 3 & 4 Will. 4. c. 42.

Several of the decisions on the statute 32 Hen. 8, c. 37, which we shall now consider, seem to be anplicable also to the statute by which its provisions have been extended.

It applies only to cases in which the owner of the rent, if he had lived, might have distrained himself; and, therefore, if the rent be in arrear, and the

v. Gilbee, 8 Taunt. 159, s. c. 2 Moore, 48. Martin v. Burton, 1 B. & B. 279, s. c. 3 Moore, 608. Staniford v. Sinclair, 2 Bing. 193. s. c.

⁹ Moore, 376. See 2 Wms. on Ex. 605.

² Prescott v. Boucher, 3 B. & Ad. 849.

by Executors and Administrators.

owner grant away his interest, and die, his executors or administrators can have no distress for these

arrearages.3

By the words of the statute, the distress must be made on the lands whilst in the possession of the "tenant in demesne," or some person claiming under him, by purchase, gift, or descent; and therefore it extends to the possession of those persons only who claim under the tenant, and does not comprise the lord claiming by escheat,4 tenant in dower, or by the curtesy,5 for they come in, not under the party but by act of law. This clause has not, however, received the strictest construction; for where A., being seized of a reversion in fee after the determination of an existing lease for years, granted a rent-charge in fee, and after the expiration of the lease, infeoffed B. in fee; and then the grantee made his executors and died, and B. made a lease at will; the executors of the grantee having distrained upon the lessee at will for the arrears due in the life-time of the grantee, and before the expiration of the lease for years; it was agreed, that the arrears were lost at common law; but that, although the lessee at will claimed immediately under the feoffee, and not under the tenant in demesne, (who in this case was the grantor,) yet the remedy having been destroyed by the act of God, namely, by the death of the grantee, the statute should be liberally expounded as a remedial law, and the lessee at will be considered as holding under the grantor, because he in effect held from him, and as such, that he should be charged with the arrears by the statute.⁶ So, if tenant in fee make a gift in tail, and the donee die, the issue in tail is within the statute, for he claims (only) under the title and estate of the tenant in demesne, although he does not claim only by descent, but per formam doni. if there be tenant in tail, with the remainder over in

³ Co. Lit. 162, b. Ognel's case, 4 Co. Rep. 50, b. Dixon v. Harrison, Vaugh. 40.

⁴ Co. Lit. 162, b. for he takes by title paramount.

⁵ Anon. 1 Leon. 307. This was obiter dictum.

⁶ Ognel's case, 4 Co. Rep. 48, b.

fee, the issue in tail is within the statute.7 case of a rent-charge it has been decided, that if tenant in tail grant a rent for life, and die, the executor of the grantee cannot distrain for any arrears upon the issue in tail, because the issue in tail comes in under the original gift in tail, and consequently by title paramount to the tenant in demesne.8 Where A. granted a rent-charge to B., and the rent being in arrear B. died, and then A. enfeoffed C. in fee, who afterwards enfeoffed D., who enfeoffed E., it was held that E. should be chargeable with the arrears to the executors of B.9 But neither a remainder-man, nor a reversioner can be said, in any manner, to claim under the tenant for life, or in tail. So that, if a man make a lease for life, the remainder for life, the remainder in fee, and the first tenant for life do not pay the rent due to his lord, and then the lord die, and the tenant for life die, the executors cannot distrain upon him in remainder, because he does not claim by or from the tenant for life. And so it is in the case of a reversioner.1

These cases, as to the question on whose possession executors and administrators may distrain for arrears, do not apply to estates per autre vie. So that, if a man grant a rent-charge to A. for the life of B., and make a lease to C. for life, remainder to D. in fee, and the rent be in arrear, and then B. die, and afterwards C. die also; A. or his executors or administrators may distrain D. in remainder for all the arrears. And this difference arises from the diversity of the first and fourth sections of the statute; the latter section, in the case of an estate per autre vie, giving a distress generally, on the lands themselves, out of which the rent issues; without the restriction contained in the first section; which applies to all other

⁷ Ognel's case, 4 Co. Rep. 50, b. against the opinion in Plow. Com. in Manxel's case. 4, b. But see next note.

⁸ Lord Fairfax v. Lord Derby, 2 Vern. 612. Lambert v. Austin, Cro. Eliz. 333. It

seems difficult to discover any grounds for this distinction in the interpretation of the statute.

 ⁹ Anon. 1 Leon. 302, 418.
 Ognel's case, 4 Co. Rep. 50, b.
 1 Co. Lit. 162, b.

by Executors and Administrators.

estates, and confines the distress to the possession of the tenant, from whom the rent is due, or to the possession of persons, claiming by and from such tenant

by purchase, gift, or descent.2

All manner of arrears of rent issuing out of a freehold or inheritance, whether in money, or in corn, cattle, fowls, spurs, gloves, or any other profit to be delivered, and whether it be annual, or every two. three, or four years are within the statute; but workdays or any corporal service or the like, are not within it; 3 neither are arrears of a nomine pænæ.4

Rents issuing out of freehold lands are alone within the statute; consequently, it does not extend to enable executors or administrators to distrain for ar-

rears of rents issuing out of copyhold.5

As to the exercise of the remedy of distress in a case where there are several executors or administrators; they may either all join in distraining, or, it seems, any one of them may distrain alone for the whole rent due; for they are all regarded in the light of an individual person.6 They have a joint and entire authority and interest in the effects of the testator or intestate, which is incapable of being divided; and in the case of death such authority and interest will vest in the survivor? without any new grant from the ecclesiastical court.8

As to the time when they are first entitled to exercise the remedy of distress, we must distinguish between executors and administrators. For in the case of an executor, as his interest in the estate of the deceased is derived exclusively from the will.9 so it vests in him from the moment of the testator's death.1 Things immoveable, indeed, as leases for years of land or houses, are not deemed to vest in

² Co. Lit. 162, b. Edrich's

case, 5 Co. Rep. 118. ³ Co. Lit. 162, b.

Ante, p. 58, and n. 6. ⁶ 3 Bac. Abr. 30. tit. Exors.

⁷ Anon. Dyer, 23, b. Com.

Dig. Admon. (B. 12.)

Hudson v. Hudson, Cas. Temp. Talb. 127. See 1 Wms. on Ex. 591.

^{9 1}Wms. on Ex. 159, 395. Id. Com. Dig. Admor. (B. 10.) Woolley v. Clark, 5 B.

[&]amp; Al. 745, 746.

possession before entry, but a reversion of a term, which a testator granted for part of the term, is in the executor immediately by the death of the testator. On the other hand, an administrator derives his title wholly from the ecclesiastical court: he has none until the letters of administration are granted, and the property of the deceased vests in him only from the time of the grant.⁴ An executor therefore may distrain at any time after the death of the testator, even before probate; but where a landlord, entitled to the reversion of a term of years, died without appointing an executor, a distress for rent made after his death, and before any grant of administration, was held unjustifiable.⁵ The grant of administration, however, has the effect of vesting leasehold property in the administrator by relation, so as to enable him to distrain afterwards for rent previously accrued.

levisees and egatees.

A rent-service may be devised or bequeathed. By a devise of a freehold reversion in lands, or by a bequest of a reversion of a chattel real, expectant on a particular estate, during which a rent-service has been reserved, the rent will pass as incident to the reversion; and the devisees and legatees, in either case, are entitled to distrain in respect of their reversionary estate or interest.7 And where a rent-service is devised or bequeathed without mention of the land. the land itself will pass, unless a contrary intention

the administrator to claim a year's rent from the sheriff levying. Waring v Decobury, Gilb. Eq. Rep. 223. s. c. Vin. Abr. Exors. (Q.) pl. 29. see

post. c. 6.

² 1 Wms. on Ex. 398.

³ Trattle v. King, T. Jones,

⁴ Woolley v. Clark, 5 B. & Al. 745, 746.

⁵ Keane v. Dee, 1 Alcock and Napier, 496, n. (Irish.)

⁶ Rex v. Horsley, 8 East, 410. 1 Wms. on Ex. 397. 3 & 4 Wm. 4. c. 27, s. 6. But, if between the death of the intestate and the grant, the goods of the tenant of the land are taken in execution, the subsequent grant of administration cannot entitle

⁷ Sacheverell v. Frogate, 1 Vent. 164, a. Even at common law, before the statute of Wills, it was held that devisees by custom might distrain for rent without the attornment of the tenant to give them seisin, because the will of the testator might otherwise have been defeated. Lit. sec. 585, 586.

by Devisees and Legatees.

appear; and as no separation from the reversion will take place in such case, it will continue a rentservice, and distrainable as such, in the hands of the devisee or legatee. Where a rent-service is devised alone, expressly without any estate in the land, it will be a rent-seck in the hands of the devisee distrainable under the statute 4 Geo. 2, c. 28, s. 5. But a rent-service reserved on an under-lease of a chattel real, and bequeathed apart from any interest in the land, would, it seems, be reduced to a mere personal annuity. 9

A rent-charge also may be devised or bequeathed, and the remedy by distress will of course enure to

the devisee or legatee.

Formerly where a rent de novo was devised alone, without any estate in the land, it seems to have been necessary for the devisor to give a power of distress, that is, to make it a rent-charge, in order to entitle the devisee to distrain: but this is no longer necessary, except perhaps in the case of a rent for years, for at the present day a rent, without any interest in the land, devised for an estate in fee, in tail, or for life, must be considered to be a rent-seck distrainable under the statute 4 Geo. 2, c. 28, s. 5.3

A rent may be devised or bequeathed although it be suspended by the testator's uniting the possession of the rent and the land,⁴ provided it be not extinguished.⁵ In all cases, therefore, where there is a unity of possession in the rent, and the land out of which it issues, it becomes a question, whether by means of it, the rent be extinguished, or only suspended. In the bequest of a chattel, this question may arise with respect to a unity of possession not

⁸ Kerry v. Derrick, Cro. Jac. 104. Maundy v. Maundy, 2 Stra. 1020. Allan v. Backhouse, 2 Ves. and Beam. 74. 1 Pow. on Dev. by Jarm. 235. ⁹ See ante, p. 29.

¹ Gouge v. Hayward, Bridgm. 52.

² As to a rent-seck for years, see *ante*, p. 29, and n. 7.

⁸ Buttery v. Robinson, 3 Bing 392. s. c. 11 Moore, 262. Unless the rent is expressly charged on the land, it will amount only to a mere personal annuity. Id.

⁴ Cader & Oliver's case, 3 Leon. 154.

⁵ Anonym. 2 An. 194. Stafford's case, Dyer, 253. Long v. Buckeridge, Stra. 106.

only in the testator, but even in his executor. As where a man by his will bequeathed to his wife a term of years, for so long time as she should continue unmarried, and after her marriage, a rent payable out of the same lands, and made her his executrix; although the whole term vested in her as executrix, yet it was held, that it did not extinguish the rent by unity of possession.⁶

Devisees and legatees are frequently entitled to an apportionment of rent. As where on a devise or bequest of the reversion of two parts of land, out of which a rent-service is reserved during the continuance of the particular estate, the devisee or legatee

will take two parts of the rent.7

As regards the exercise of the remedy of distress there exists a material difference between the case of a devisee of a freehold estate or rent, and the legatee of a chattel interest: for a devise vests absolutely by the testator's will, and the devisee becomes immediately entitled to distrain for any rent subsequently accruing; whereas the interest of the legatee must await the executor's assent to the bequest; for till such assent the interest remains in the executor, and the legatee cannot distrain.8

'enants under xecutions.

A tenant of a rent by *elegit*, or by statute-merchant or statute-staple, is entitled to the remedy of distress for its recovery; for in the case of a rent-charge, the clause of distress, attached to the grant or reservation, follows the rent into whatever hands the rent itself passes; and in the case of a rent-service, such tenant is entitled for the time being to the immediate reversion, although from the nature of his estate it may be very uncertain whether the land on which the rent is reserved will ever fall into his possession.⁹

Under the writ of *elegit* formerly ¹ the law would apportion the rent: so that, where a man leased for years, reserving rent, and afterwards one moiety of

⁶ Gouge v. Hayward, Bridgm. Rep. 54. s. c. 1 Rol. Abr. 610.

⁷ Co. Lit. 148, a.

⁸ As to the executor's assent to a legacy, see 2 Wms. on

Ex. 843, et seq.

⁹ Bro. Distr. pl. 72. Pool v. Neel, 2 Sid. 29. Dighton v. Greenvil, 2 Vent. 327. Corbet's case, 4 Rep. 82.

¹ Since the statute 1 & 2

he reversion was taken in execution, the tenant by legit took one moiety of the rent.2

A tenant by elegit is not within the statute 32 Hen. 3, c. 37, giving to the executors, &c. of a tenant for ife a distress for the arrears of rent accrued in his life-And therefore, where there was judgment gainst the tenant for life of a rent-charge, and a noiety of the rent was taken in execution under an elegit; and more rent being in arrear, the tenant for life died; it was held, that the tenant by elegit could not distrain for the arrears accrued before the tenant for life's decease, he not being named in the statute, nor coming in under the party, but by act of law.3

It has also been said that tenant by elegit does not come within the terms of the statute, 4. Anne, c. 16, s. 9, and that attornment is still necessary before he can proceed for rent.4

If a lease for years be made reserving rent, and then the lessor acknowledge a statute, which is extended, the conusee may distrain for the rent accruing after the extent; but he cannot distrain for rent accrued before the extent, although it accrued after the statute was acknowledged.5

All persons who have vested in them legal estates, Trustees and though in trust for others, as the trustees of a feme Assignees, &c. covert, or the assignees of a bankrupt or insolvent, may distrain for rent in respect of such legal estates, in the same manner as if they were themselves beneficially interested therein.

So where such trustees make leases under special powers, or by virtue of any authority given them by act of parliament, they may of course distrain for the rent reserved.

Guardians may distrain in their own name for any Guardians. rents forming part of the infant's estate; and they

Vict. 110, the writ of elegit is no longer confined to a moiety.

² Vin. Abr. Apport. D. 4.

⁸ Pool v. Neel, 2 Sid. 28. 62. Buller N. P. 57.

⁴ Harris v. Booker, 4 Bing. 99.

⁵ Co Lit. 270, b.

⁶ As in the cases of assignees of bankrupts and insolvents by the statutes 6 Geo. 4, c. 16, s. 77; and 7 Geo.

^{4,} c. 57, s. 22.

may also make in their own name leases of any of the infant's lands, which will be good during the minority: for they are therefore appointed, because the infant, in regard of his minority, is supposed incapable of managing himself and his estate; they derive their authority not from the infant, but from the law, and may transact all affairs in their own name, and not in the name of the infant, as they would be obliged to do if their authority were derived from him.⁶

Committees of lunatics.

Committees of lunatics are enabled by statute 43 Geo. 3, c. 75, s. 4, to grant leases of the lunatic's estate under the direction of the Lord Chancellor, and therefore are entitled to distrain, like other lessors, for the rent reserved. By the same statute, sec. 3, they may, under the same authority, exercise powers of leasing vested in the lunatics.

Receivers and Agents.

Whoever distrains as agent for another must of course make the distress in the name of the person legally entitled to the rent.

Receivers also come under the same rule, whether appointed privately by deed, or by the court of Chancery. For having no estate whatever in the land, they are considered merely as bailiffs or stewards distraining under the particular appointor for him and in his name, or under the sanction of the court in the name of the person legally entitled to the rent.

If instead of simply appointing a receiver, as such, in the ordinary way, to collect and recover the rent, the party or parties having the legal estate make a demise to him for that purpose,⁷ in such case he may of course distrain, like any other trustee, in his own name.

And even where a mere receiver, having no estate whatever in the land, without right or authority made a lease reserving rent, and distrained in his own name, it was held that the lessee was estopped from disputing the distress.⁸

⁶ Shoplane v. Roydler, Cro. Jac. 99. Bedell v. Constable, Vaugh. 179. 3 Bac. Abr. 403. 4. Id. 138. Gwill. ed. Guard. (A.) Lease. (I.) 9. 2 Byth. by Jarm. 404.

⁷ As recommended in 2 Byth. Convey. by Jarm. 300, 419.

⁸ Dancer v. Hastings, 4 Bing. 2. s. c. 12 Moore, 34.

A private receiver, if intended to be vested with powers of distress, even in the name of his appointor, should have an express and specific authority given o him for that purpose; for authorities are construed trictly; and an authority to tenants to pay rent to a hird person whose receipt was to be their discharge. us been decided not to entitle such person to distrain or its recovery.9

But receivers appointed by the court of Chancery ccupy a different position in this respect: they may listrain of their own authority, where they see it eccessary, without first applying to the court for a articular order for that purpose; 1 for, as the court ever makes an immediate order, but appoints a future ay for a tenant to pay, an injury might ensue from he delay, as it would give the tenant an opportunity o convey his goods off the premises in the mean time; nd in their case, an authority given to receive the ents carries with it an authority to enforce the payment.² The only cases in which they should apply o the court previously, are those in which there is ny doubt who has the legal estate; it then becomes ecessary, in order that an order of the court may deermine in whose name the distress should be made.3

As a mortgage transfers the legal estate in the Mortgagee ar remises to the mortgagee, he becomes entitled to mortgagor. he legal rights and remedies of the mortgagor; lthough the mortgagor, as is generally the case, be llowed to remain in possession.4

Where the premises mortgaged, or part of them,

Ward v. Shew, 9 Bing. 08. s. c. 2 M. & Scott, 756. ¹ Pitt v. Snowdon, 3 Atk. 50. Brandon v. Brandon, 5 lad. 473. Bennett v. Robins, C. & P. 379. Dancer v. lastings, 4 Bing. 2. s. c. 12 loore, 34. ² Bennett v. Robins, 5 C. &

^{. 379.} Pitt v. Snowdon, 3 Atk. 50. Hughes v. Hughes, 3

ro. Cha. Ca. 87.

⁴ There is some obscurity in the books in what light the mortgagor, during the period of actual possession, or receipt of the rents of the land (see infra), stands in respect to the mortgagee. The result of the cases, however, appears to be, that he may be considered as tenant for a term, or at will, or by sufferance, or as a trespasser, according to circumstances. Coote on

have been leased before the mortgage, the pos of the tenant cannot be disturbed by the more who has but an assignment of the reversio can thereby have no greater rights over the par estate than his assignor himself had. In right reversion, however, he is entitled to all rent ac due subsequently to the mortgage; and if h notice of his claim to the tenant in possession the lease, he may distrain as well for such 1 arrear at the time of the notice, as for that may become in arrear afterwards; for the tenar such notice, is bound to pay the rent in hand a ing to the legal title; and his payment of it t ther than the mortgagee can be good only wh has no notice of the mortgage, or where he i considered as paying it to the mortgagor w mortgagee's consent.⁵ It is usual, indeed, in th also not to disturb the mortgagor, but to perm to continue in the receipt of the rents and 1 after the execution of the mortgage, so long a as the interest upon the mortgage-money is repaid; but he can be considered only in the li the receiver⁶ of the mortgagee (without any li to account;7) and if he were to distrain for suc it must be only with the authority and in the of the mortgagee, as his agent, and with no the tenant of the mortgage; for all privity of between himself and the tenant being comdestroyed, he has lost all remedy by distress own name even for arrears previously due.

If a mortgagor, who has merely been allow remain in possession, make a lease after the gage, such lease is absolutely void as again mortgagee, and the tenant under it is a tres whom he might eject without notice; but

Mort. 389. 2nd ed. Watk. Conv. 13. 7th ed. Hitchman v. Walton, 4 M.&W. 413. and the cases cited infra.

⁶ Moss v. Gallimore, 1 Doug. 266.

⁶ Moss v. Gallimore, 1 Doug. 283.

 ⁷ Ex parte Wilson, 2
 B. 252.

⁸ Keech v. Hall, 1 Do Thunder v. Belcher, : 449. But see in fin Denman's judgment ir v. Elliott, 1 Perry & D

ere by deed, and the lessee be not evicted ortgagee, the mortgagor himself may disthe rent reserved by virtue of the estoppel.9 in such case the mortgagee, by merely e tenant notice of the mortgage, and rehim to pay the rent reserved by the morthimself, could make the tenant hold under and enable him to distrain, was recently a of some doubt; but it is now clearly deat such notice alone is not sufficient, and tenant's attornment1 at least is necessary to he relation of landlord and tenant.² An it, express³ or implied, as by a payment of he mortgagee after notice, and an acceptance im, will sufficiently create a tenancy between Such tenancy will not be a confirming of granted by the mortgagor, but will operate viction of the mortgagor's tenant, and as a ng to him from year to year. It cannot relate back to the time of the demise by tgagor, or confer a right of distress by the ee for any rent which accrued due during ncy under the mortgagor.6 The mortgagor urse precluded from distraining for any rent new tenancy has been created between the nd the mortgagee. nortgagor remain in possession under any

nounting to a re-demise to him, he may of nake any valid underleases, not inconsistent

ne v. Gomme, 2 Bing.

erm attornment is ord Denman, C.J. in Elliott, but it must tood to mean merely nt or agreement of

v. Elliott, 1 Perry. Doe v. Bucknell, 566. overruling the in Pope v. Biggs, 245, and Waddilove

v. Barnet, 2 Bing. N. C. 538. See also Partington v. Wood-cock, 5 N. & M. 677.

³ Doe v. Boulter, 1 N. & P. 650.

⁴ Rogers v. Humphreys, 4 A. & E. 299. s. c. 5 N. & M. 511. Evans v. Elliott, 1 Perry & D. 259. per Coleridge, J. ⁵ Doe v. Bucknell, 8 C. & P.

⁶ Evans v. Elliott, 1 Perry & D. 256.

with the extent of his own interest, and distrain for any rents reserved.7

Where a mortgagor remains in possession of the premises, the mortgagee cannot distrain upon them for the interest of his mortgage money, unless the relation of landlord and tenant be clearly established between them, and the sum distrained for be reserved as a fixed and certain rent.⁸

Corporations, 1. Sole.

Corporations sole (except the crown), whether ecclesiastical or civil, do not possess any peculiar rights, or lie under any peculiar disabilities, with regard to the power of distress, but fall under the general principle, of distraining according to the nature of their estate; freehold interests in land or rent, descending to the successors of sole corporations, but chattely real and personal to the executors or administrators of the lessor or grantee, except in some cases by particular custom.

The crown is by prerogative entitled to peculiar legal remedies, and amongst the rest, to a power of distress for rent more ample and beneficial than

belongs to a subject.

Thus, the king may distrain for a rent-service not only on the land out of which it issues, but also on all other lands of the tenant, though held of other lords; provided, however, that the lands distrained upon be in the actual possession of his tenant; for if they be under-let for years, or at will, the undertenant's effects are not liable to the king,² unless the under-lease were made after the rent distrained for accrued due.³ This prerogative extends also to feefarm rents, rent-charges, and even to rents-seck, at

⁷ Wilkinson v. Hall, 3 Bing. N. C. 508.

⁸ Hope v. Booth, 1 B. & Ad.
498. Rogers v. Humphreys,
5 N. & M. 511. s. c. 4 A. & E. 299.

⁹ Co. Lit. 9, a. 46, b.

¹ Ib. and Harg. n. (1) on Co. Lit. 9, a.

² Bro. Abr. Prerog. pl. 68,

^{77. 2} Inst. 132. 4 Ib. 119. 3 Leon. 124. Warden and Commonalty of Sadler's case, 4 Co. Rep. 56. Plowd. 227. 16 Vin. Abr. 513, 4. tit. Prerog. F. Bac. Abr. Prerog. E. 3. 2 Vern. 714. Chitty, Junr. on Prerog. 208, 9.

³ 1 Roll. Abr. 670.

common law, whether the rent vest in the crown by grant, or by escheat 4 upon attainder. The king by his prerogative may also distrain in the highway. 5 And even at common law, and before the statute 4 Anne, c. 16, if a grant of land or rent were made to the king, he could distrain without attornment. 6

In general this prerogative of the crown may be considered as belonging exclusively to the crown itself, and its grantee cannot exercise it. But even in the case of a grantee, and at common law, if the king granted to a subject a reversion or rent, it passed immediately without attornment, and the grantee might distrain;8 except in the case of lands held of the duchy of Lancaster, and not situate within the county palatine.9 And by statute 22 Car. 2. c. 6, for the sale of crown fee-farm rents, the vendees of such rents are entitled to the same remedies 1 for the recovery of them as were possessed by the crown itself; and they may therefore distrain upon all the lands of the original grantor. It seems that either the king or his vendees may make such a distress although the lands distrained upon be under a sequestration out of Chancery.2 This statute, however, does not extend to any other than the fee-farm rents sold under its authority; and therefore the king's grantee of a rent-charge, cannot now, any more than he could at common law, distrain in any other lands than those upon which the rent is specifically charged.8

⁴ Although this be so said, yet, as far as regards rent-charge and rent-seck, it must be understood of forfeiture, not of escheat, with which forfeiture is frequently confounded: for such rents can-sot properly escheat (see sate, p. 39.), not even to the king when immediate lord of the fee, but they may be forfeited upon attainder.

⁸ 2 Inst. 131.

⁶ Co. Lit. 309.

 ⁷ Bro. Abr. Prerog. pl. 68.
 ¹⁶ Vin. Abr. 513, 14.

⁸ 1 Roll. Abr. 291.

⁹ Co. Lit. 314, b. Duchy of Lancaster case, Plowd. 221. 4 Inst. 209. Chitty, Junr. on Prerog. 209.

¹ Process of extent being expressly excepted by s. 8.

² Attorney Gen. v. Mayor of Coventry, 2 Vern. 713. s. c. 1 P. Wms. 306.

⁸ Bro. Prerog. pl. 68.

If land be given to the king and a subject, to have and to hold to them and their heirs, yet they are tenants in common, and not joint-tenants thereof; for they take in different capacities, and the king cannot be a joint-tenant with a subject.⁴

Corporations, 2. Aggregate.

Corporations aggregate, whether civil or ecclementical, cannot, as a general rule, perform any acts is pais but under their common seal: and therefore they must both make and accept leases, or other conveyances of land, and grants of rent, under such seal. But if a lease be made by the agent of a corporation, not under their common seal, although it be invalid as a lease, for want of due execution, yet if the tenant hold under it, and pay rent to the bailiff of the corporation, that is sufficient to constitute a tenancy at least from year to year, and to entitle the corporation to distrain for the rent.

Where leases are made by corporations aggregate or sole, whether or not they are made conformable to the statutory provisions, so as to bind the successor, the remedy of distress, at least with respect to the lessor, is the same as belongs to such a lease at common law. For though leases contrary to these acts are declared void, yet they are good against the lessor during his life, if he be a corporation sole; and also against an aggregate corporation, so long as the head of it lives, who is presumed to be the most concerned in interest: therefore if good against the lessor, they would generally be good against the lessee by the mutuality of estoppel.

With respect to the recovery of rents-seck, chiefrents, and rents of assize, the statute 4 Geo. 2. c. 28, has placed bodies politic and corporate on the same footing as other persons.

A corporation may appoint a person to distrain

⁴ Co. Lit. 190, a. 1 Saund. 319, n. 4. Bac. Abr. Joint-tenants, B. 2 Bl. Com. 184. Chitty, Junr. on Prerog.

⁵ Mayor of Thetford's case, 1 Salk. 192.

⁶ Wood v. Tate, 2 New R. 247.

⁷ See these enumerated ² Bl. Com. 321.

^{8 2} Bl. Com. 321.

On whose Possession, and of whose Goods.

without deed; for the appointment of a bailiff to distrain is for a common service, and not for an extraordinary one, requiring the sanction of the corporate seal.⁹

So far we have thought it advisable to consider severally and distinctly the persons who may be entitled, in respect of their estate or interest, to distrain for rent: and we hope that this section will in practice make it easy to determine in each particular instance who should distrain, or in whose name the distress should be made.

We proceed to inquire of the persons, on whose possession the party distraining may exercise his remedy, and whose goods are liable to be taken, or we exempted from liability.

SECTION II.

Of Persons whose goods are liable to, or exempted from, a distress for rent.

As rent is a profit issuing out of the land, and as distress is a remedy for its recovery substituted in the first instance for an entry on and possession of the land, it follows, that in the application of this remedy, it is to the land itself that the distrainor must look, and not to the person of the lessee, or the person of the grantor of the rent; for his claim is not in respect of the person in possession of the premises, or owning the effects found there, but in respect of the premises alone. It may, therefore, be considered as a general rule,—subject always to certain exceptions, which will be mentioned in this and the following chapter—that a party entitled to rent in arrear may

General ru

Salk. 191. Manby v. Long, 3 Lev. 107. Smith v. Birmingham Gas Company, 1 A. & E. 526: Church v. Impe-

rial Gas Company, 6 A. & E. 861. 2 Bac. Abr. Corporations (E.) 3.

¹ See ante, p. 19.

² See ante, p. 4.

distrain on the premises out of which it issues, in whosesoever possession they may be at the time of the distress, whether in that of the original lessee, or grantor, or of his assignee, or undertenant, or heir, or devisee, or executor, or of a disseisor, and whether held in severalty, coparcenary, joint-tenancy, or in common; and may take whatever chattels and personal effects are found there, whether they belong to the tenant, or to any other persons.

Roll. Abr. 671. Saffery
 Elgood, 1 A. & E. 191. s. c.
 N. & M. 346.

Even where the original lease, out of which the underleases were derived, has been surrendered in order to be renewed, and a new lease has been granted (without surrender of the under-leases) the under-lessees continue liable to the distress of the original lessor by particular enactment. This arose from an inconvenience of the common law. For at common law the surrender of a lease in . order to have it renewed was often prevented by the undertenants' refusing to surrender their under-leases; without which there could not be a renewal of the principal lease, out of which they were derived. Therefore it was provided by the statute 4 Geo. 2, c. 28, s. 6, that such renewal of the principal lease, shall be completely valid and effectual, without a surrender of the under-leases; and that the chief landlord or original lessor, and his executors and administrators may distrain upon the under-lessees for the rent reserved upon the renewed lease, as if the original lease had been still

subsisting, so far as such rent shall not exceed the rent originally reserved.

As to distress on undertenants by the king, see ante, p. 76.

⁶ Braithwaite v. Cooksey, 1 H. Bl. 465. Bolton v. Canham, Pollex. 120.

⁶ Humphrey v. Damion, Cro. Jac. 300.

7 Even if coparceners make partition of their lands, if done without notice to the lord, he may still distrain upon them jointly, as before partition; for, as has been said (ante, p. 47.), persons seized of joint estates cannot in general sever them to the prejudice of others. Insumonger v. Newsam, Latch. 261.

⁸ Where the land comes into the possession of several tenants, a distress for the whole rent may be made on the possession of any one of them; for the entire rent issues equally out of every part of the land. 1 Roll. Abr. 671.

The exceptions arising from the peculiar nature of the things themselves, and from the circumstances under which they are found, will be treated of in the next chapter. e necessity of this rule is obvious, when we conby what varieties of fraud and collusion the of a landlord or grantee of a rent might be ed. if he were restricted in his remedy by disto the possession and goods of his immediate or grantor.

shall consider in this place such exceptions general rule as are of a more personal nature, s to say, those which arise from the possession premises, and the ownership of the effects found

is no distress for rent can be made on land in No distress cal ssession of a person holding by title paramount be made on the distress. For, in the case of a rent-service, if possession of: nant be evicted by a title above that of his land-paramount to he rent itself becomes extinguished, and conse- the distress. y there is nothing to support a further distress he land. And so in the case of a rent-charge, oods of the tenant of the land are not liable to en on a distress for a rent granted subsequently creation of his tenancy, for he holds the land this term independently of the charge, and by aramount to it.2 In the same manner, if a lord a rent-charge to be issuing out of his manor, nnot thereby charge lands in the possession of opyholders, who are in the above grant.8 And f a man be seised of a rent-charge by prescripssuing out of a manor, he cannot distrain the of the copyholders of the manor, unless there rustom also to warrant the distress; for the ts are in by prescription also, and their title is st as high as that of the owner of the rent.4 the same grounds, and because joint-tenants t charge the land to the prejudice of their cots, one joint-tenant is not liable to be distrained for a rent-charge created by another.5

[?] ante, p. 34, and Hop-. Keys, 9 Bing. 613. s. c. : Scott, 760. Il. Abr. 669. Com. Dig. s. B. 2. Reynald v. , Roll. Abr. 672. Lum-Rent-charges, 382.

Saffery v. Elgood, 1 A. & E. 191.

^{3 1} Roll. Abr. 669, 670. See Lumley on Rent-charges, 227.

⁵ See ante, p. 47. But if one joint-tenant, after grant-

for on the erson having n estate in he land.

Neither can a distress for rent be made on the possession of a possession of a person having an estate or interest, jointly with the distrainor, in the land out of which it issues. Thus we have seen,6 that amongst coperceners, if one have a rent-charge issuing out of lands, which she holds with her sisters in coparcenary, she cannot distrain upon them before partition made on account of their privity of estate. And the same rule extends to co-heirs in gavelkind, and to joint-tenants. But in the case of a rent-service created between them it is otherwise; for as joint-tenants, like tenants in common, may hold of each other, so they may distrain on each other for a rent-service reserved: the distress being confined to the part of the land so holden.7

Nor on the ossession of the king.

Another case of privilege arising from the possession of the premises is that of the king, who is entitled, not only to peculiar rights of distress, but also to peculiar exemptions from it: for as distress is a remedy for a wrong, of which by law the king is considered to be incapable; and as it would be inconsistent with the dignity of the crown, that the king should be treated as a wrong-doer, it is a rule, that no man can distrain upon land in the possession of the crown, whether upon office found or not.8 Thus, if lands be seised into the hands of the king even by false office, no distress can be made thereon; for the office, though false, is, whilst it continues to be in force, sufficient to preclude a distress.9

In many cases also the distress is suspended, not only during the possession of the king himself, but even during the possession of his grantee. But this seems to depend upon the nature of the rent, and, in

ing a rent-charge, were to lease the land for years to his co-tenant, or were to release his share to him, then the latter would hold the land subject to the charge, as coming in under a later title. Co. Lit. 186, a. Bro. Dist. pl. 69. ⁶ Ante, p. 46.

⁷ Co. Lit. 186, a. Bro. Dist.

pl. 69. But in this case it cannot be considered a distress on the possession of a person having an estate in the land. for the demise should seem to have created an independent tenancy.

⁸ Bro. Dist. pl. 46. Chitty's Prerog. 281, 376.

⁹ Id. Bro. dist. pl. 77.

me cases, also upon whether or not the king's posssion was upon office duly found. Thus, in the use of a rent-service, where the king is entitled by fice or record, he who was possessed of the land is asted; the land is vested absolutely in the king: nd no distress can be made by the lord either on the ing's possession, or on that of his grantee. But there the king enters without office or record, there is patentee may be distrained on, though not he imself. In the case of a rent-charge, however, if he king be entitled, by office found, to the land out f which it is issuing, or be otherwise in possession, lthough the grantee of the rent cannot distrain on he possession of the king, yet if the king grant wer the land, then the rent and all arrears may be distrained for: the remedy in this case being restored by the crown's parting with the possession.2 If the rent-charge, as well as the land, be found by the office, then, it seems, the remedy of distress will be absolutely gone.

It may be scarcely necessary to say, that lands in Nor on the the possession of a succeeding tenant are not liable possession of a for arrears accrued due in the time of a preceding new tenant for tenant.⁴ Neither are copyhold lands chargeable in the hands of a tenant newly admitted, for rent due from his predecessor.⁵

In cases where a remedy by distress is given by Distress on statute to persons who were not entitled to it at compossession mon law, as to executors and administrators by the limited by statute 32 Hen. 8, c. 37,6 or at a time to which the statute. common law did not extend it, as after the expiration of a term by the statute 8 Anne, c. 14,7 the exercise of the remedy must of course be strictly limited to the possession mentioned in such statutes.

Of the exceptions arising from the ownership of Emblements.

¹ Bro. Dist. pl. 47. ² Bro. Dist. pl. 27. Anon. Sav. 125. 1 Leon. 191. Bro. Prerog. pl. 120. Id. Trav. de office, pl. 32. Petition, pl. 9. Lumley on Rent-charges, 382.

³ Bro. Entre congeable, pl. 125.

⁴ Pollex. 130.

⁵ See ante, p. 58.

⁶ See ante, p. 11.

⁷ See ante, 12. post. c. 4, s. 1.

the effects found upon the premises, we shall first consider one very nearly bordering on those which arise from the possession of the premises; --- an exception necessarily resulting from the protection afforded by the law to agriculture in the case of emblements. For as the law is, that if the estate of a tenant at will be determined either by his death, or by the act of his landlord, he in the one case, and his executors in the other, shall still be entitled to reap the emblements or growing crops which he has sown, with free liberty of ingress, egress, and regress to come upon the land to cut and carry them away: so, as well after as before the crops are reaped, if they remain on the land a merely reasonable time for the purpose of husbandry, they cannot be distrained for the rent of a succeeding tenant; whether they be in the hands of the tenant at will himself, or of his representative, or in those of a vendee 9. And the same rule should seem to extend to all cases of persons entitled to emblements 1, for the same reason holds in all, that the landlord has no power to let the land, except subject to the same condition as he himself held it 2.

No distress on the goods of ambassadors.

Another exception arising from the ownership of the effects found upon the premises was created by the statute 7 Anne, c. 12; by which the goods of all ambassadors, or of other public ministers, of any foreign prince or state, or of the domestic servants 3 of any such ambassadors, or public ministers, are privileged from distress, as well as from execution.

Nor on goods in the custody of the law. We shall next consider the rule, that goods already in the custody of the law are not distrainable for rent. Under this rule, for example, things already distrained for rent, or taken damage-feasant, goods in the hands of a bailiff under an execution, or seised by

⁸ Lit. sec. 68; Eaton v. Southby, Willes, 136.

⁹ Eaton v. Southby, Willes,

As to who are entitled to emblements, see Har. Woodf.

L. and Tent. 484. 3rd ed.

² Per Willes, C. J., Willes,
137

⁸ See Novello v. Toogood, 1 B. & C. 554; s. c. 2, D. & R. 833.

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process at the suit of the king, or taken under an attachment, are privileged from distress; s for it would be repugnant that it should be lawful to take goods out of the custody of the law.4 In the case of the crown, not only are the goods bound by an extent where it has actually issued, but even without an extent the debt itself is held to create an immediate lien on them, which in general cannot be divested. Thus, in a case where the landlord had distrained goods for rent, but before the sale of them they were seised under an extent, it was determined, that the extent took place of the landlord's claim for rent. And in a previous case a similar determination was made, although the time for the sale had expired, and an attachment had been moved for against the sheriff, for not having sold the goods under the writ of venditioni exponas.5 So where a man was outlawed, and an extent issued thereupon, and his goods were seised, although the landlord distrained three days before the extent, it was held that he was not entitled to any part of his rent.6

After goods have been sold under a writ of execution, but are so circumstanced that it has not been

As a debt due to the crown was always preferred to one due to the subject, the claims of the crown are exempted from this provision by sec. 8. of the same statute. Rex v. Hill, 6 Price, 19.

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As to what cases, and to whom, the statute extends, &c., as to the course to be adopted by the landlord, and as to his remedy in cases where the sheriff proceeds to levy the execution and to remove the goods without paying the rent after notice, see post, c. 4.

⁴ Co. Lit. 47, a. Park. Rep.

120. Willes, 136.

⁵ Rex v. Cotton, Parker, 112. Rex v. Dale, Id. 141. And see Rex v. Pritchard, Bunb. 269.

6 Rex v. Southerby, Bunb. 5. Sed vide Greaves v. D' Acastro, Id. 194. See also Rex v. Hill, 6 Price, 19.

³ The statute 8 Anne, c. 14, s. 1, has in part alleviated the hardship inflicted on the hadlord by this rule of the common law. It enacts that no goods, taken on any lands leased for life, years, at will, or otherwise, shall be taken in execution, unless the party at whose suit execution is wed, before removal of the goods, pay to the landlord the arrears of rent, if not exceeding one year's rent; and if more, then the amount of one year's rent, due at the time of the execution.

proper to remove them from the premises, they remain under the privilege of this rule, and cannot be distrained; unless from lapse of time the possession which the law had given may be considered to have been abandoned. Thus, where a tenant's corn, whilst growing, was seized and sold under a fe. fa., and the vendee permitted it to remain till it was ripe, and then cut it; after which, but before it was fit to be carried, the landlord distrained it for rent, the distress was held to be bad: but where corn was taken in execution, and sold by the sheriff under 2 W. & M. c. 5, s. 3, and the vendee permitted it after severance to lie on the ground, the court held it to be distrainable for rent.

If, however, a sale of goods under an execution be fraudulent,—as where a fictitious bill of sale was made, and the goods remained on the premises,—they may be distrained for rent.⁸ and where the execution was irregular,—as where a sheriff's officer executed a writ of fi. fa., by going to the house and informing the debtor that he came to levy on his goods, and laying his hand on a table, said, "I take this table," and then locked up the warrant in the table-drawer, took the key, and went away, without leaving any person in possession; and after the writ was returnable the landlord distrained;—it has been held that the distress was lawful.⁹

i6 Geo. 3, :. 50, s. 6.

Another exception, which will be best considered in this place, has been created by the statute 56 Geo. 3, c. 50. It is provided, that in case of an execution, no straw, turnips, manure, hay, grass, or other produce, which by any covenant or agreement between the landlord and tenant ought to be used or expended on the land, shall be carried, or be sold to be carried, off the premises. But that it may be sold to any person who shall agree in writing with the sheriff

⁷ Peacock v. Purvis, 2 Brod. & B. 362. s. c. 5. Moore, 79. Eaton v. Southby, Willes, 131. Wright v. Dewes, 3 Nev. & Man. 790. s. c. 1 Adol. & El. 641. Where see

observations on Parslow v. Cripps, Comyn. 203.

⁸ Smith v. Russell, 3 Taunt.
400.

⁹ Blades v. Arundale, 1 M. & Sel, 710.

in case of Bankruptcy.

other officer to use and expend it on the land: in ich latter case the purchaser may lawfully use, for e purpose of consuming such crops or produce, ch buildings or fields as the sheriff shall assign to And then the sixth section of the statute goes to enact, that where a person shall have so purased any crop or produce under such agreement, it all not be lawful for the owner or landlord of the emises to distrain for rent any of the things so ld; nor any horses, sheep, or other cattle, nor any aggons, or implements of husbandry, kept or used on the land, for the purpose of carrying or conming such crops or produce, according to the prosions of the act, and the agreement with the sheriff.

The liability of goods to a distress is not affected by Distress in ie tenant's bankruptcy, so long as they remain upon case of ban ne premises; even the messenger's possession does ruptcy. ot prevent the landlord's remedy: he may distrain ither before 1 or after 2 the election of assignees; so mg as the goods remain upon the premises,8 and are msold.4 Whether or not he may distrain after a ale by the assignees, and before the removal of the

mods, seems unsettled.5

It was formerly considered that the landlord might distrain for the whole rent due, whatever its amount, but now by the statute 6 Geo. 4, c. 16, s. 74, "no distress for rent made and levied after an act of bankreptcy upon the goods of any bankrupt (whether before or after the issuing of the commission) shall be available for more than one year's rent, accrued prior to the date of the commission; but the landlord, or party to whom the rent shall be due, shall be allowed to come in as a creditor under the commission for the overplus of the rent due, and for which the distress shall not be available." It has been held that

¹ Ex parte Jaques, cited 1 Atk. 104. Anon. Id. 102. Ex parte Grove, Id. 104.

² Ex parte Dillon, cited 1 Atk. 104. Ex parte Plumner, ld. 103.

Ex parts Decharmes, 1

Atk. 103. Ex parte Devine, Cooke, 216. Bradyll v. Ball, 1 Bro. Buckley v. Taylor, 2 T. R. 600.

¹ Atk. 102, 104.

⁵ See cases cited above, and Mont. & Ayrt. Bank. 583.

where by the custom of the country half a year's rent became due on the day of the tenant's entry, the landlord might distrain at once, and before the year expired, even after an assignment under a commission of bankruptcy, the rent being due and payable according to the reservation.⁶ If a landlord distrain upon a tenant who has committed an act of bankruptcy, and leave the goods in the tenant's possession, and afterwards a commission issue, he cannot again distrain for the same rent, and his remedy is lost.⁹

In a case of bankruptcy if a landlord do not actually distrain in due time, he will not be entitled to his year's rent; so that where he neglects to exercise his remedy, and suffers the goods to be sold by the assignees, and removed off the premises, he has clearly no longer any lien, and can only come in on an average with the rest of the creditors for his whole demand.³

A trader may take a demise after he has committed an act of bankruptcy, and the landlord is entitled by

virtue of such demise to distrain for rent.9

In case of insolvency. A distress in case of the insolvency of the tenant was formerly limited to a year's rent by the statute 7 Geo. 4, c. 57, s. 31; and now by the statute 1 & 2 Vic. c. 110, s. 58, it is enacted, to the same effect, "that no distress or distresses for rent, made and levied, after the arrest or other commencement of the imprisonment of any person whose estate shall, by any order made under the act, have been vested in the provisional assignee, upon the goods or effects of any such person, shall be available for more than one year's rent, accrued prior to the making of such order; but that the landlord or party to whom the rent shall be due, shall and may be a creditor for the overplus

⁶ Buckley v. Taylor, 2 T.R. 600.

⁷ Ex parte Spottiswood, 1 Dea. & Ch. 223.

⁸ If the assignees of a bankrupt promise the landlord who has distrained, that if he will withdraw, he shall be paid out of the produce of a sale;

this is an absolute promise, and the assignees will be liable, though the commission should be afterwards superseded. Stevens v. Bell, 4 Tyr. 6. And see Burrell v. Jones, 3 B. & Al. 47.

⁹ Buckley v. Taylor, 2 T.R. 600.

What Things may be distrained.

of the rent due, for which the distress shall not be available, and entitled to all the provisions made for creditors by the act."

If the distress be made but a single day previous to the arrest or imprisonment of the insolvent, it will be available for more than a year's rent, if due, although the goods be not sold till afterwards.¹

CHAPTER III.

OF THE THINGS WHICH MAY BE DISTRAINED FOR RENT, AND OF THE THINGS WHICH ARE NOT LIABLE.

WE have laid it down as a general rule, that per- General r sons entitled to rent in arrear may distrain on the premises out of which it issues, in whosesoever possession they may be at the time of the distress; and may take whatever chattels and personal effects are found there, whether they belong to the tenant, or to my other persons. The exceptions to this rule of a more personal nature, that is to say, in respect of the possession of the premises, and the ownership of the effects, we have noticed in the last chapter; we have seen—that no distress can be made on the possession of a tenant by title paramount to the distress;—nor on that of persons having an estate in the land; nor on that of the king; -nor on the possession of new tenants for old arrears;—nor on the emblements belonging to a former tenant for arrears due from a new one;—nor on the goods of ambassadors; nor on those in the custody of the law; -- or sold under the provisions of the statute 56 Geo. 3, c. 50, s. 6. We have also considered there the cases of the tenants' bankruptcy and insolvency. And we shall now, in the present chapter, complete the list of exceptions to the above general rule, by considering those exceptions which exist to the things themselves, (in whosesoever

^{**}Wray v. Egremont (Earl & M. 188. y), 4 B. & Ad. 122; s. c. 1 N. **See ante, 79.

possession, or of whosesoever ownership,) arising either from their peculiar nature, or from the circum

stances under which they are found.

Exceptions.

These exceptions are either absolute, or merely conditional or sub modo, that is to say, in case there be a sufficient distress on the premises without them. We shall consider, first, the absolute exceptions in the following order: - exception of things in which there can be no valuable property; --- of things of a perishable nature; -- of things in present use; -- of fixtures, and things annexed to the freehold; -exception in favour of trade: secondly, the exception conditional or sub modo,—of the tools and utensils of trade, implements of husbandry, and sheep and beasts of the plough: and, lastly, we shall consider the exceptions and distinctions which exist as to distraining the cattle of a stranger which escape into the land.

Exception of there can be no valuable property.

Things wherein no valuable property can be had things in which are exempted by their very nature from liability to a distress for rent: for every thing distrained is presumed to be the property of the wrong-doer, which these things cannot be; nor can that constitute pledge which can belong to no man. Under this exception come deer and rabbits in their wild state, birds, cats, and in fact all animals feræ naturæ. if deer are kept in a private inclosure for the purpose of sale or profit, this so far changes their nature, by reducing them to a kind of stock or merchandize, that the reason of the exception fails, and they cease to be exempt.4 In like manner birds kept in cages, as parrots or canaries, have been decided to be the subjects of a right of property, and may therefore be distrained; and dogs, though formerly held to be within this exception, as animals in which no property could be had, must be considered liable at the present day.5

⁸ Co. Lit. 47, a; 3 Bl. Com. 7; Finch. 176: Bro. Abr. Property, pl. 20; Com. Dig. Dist. C; Keilw. 30, b; 1 Roll. Abr. 666.

⁴ Davies v. Powell, Willes, 46; s. c. 7 Mod. 249; Bro.

Abr. Property, pl. 44. 5 Davies v. Powell, Willer, 48. For trover may be maintained for them, Id.; Binstead v. Buck, 2 W. Bl. Rep. 1117; and the legislature has made it penal to steal them.

of Things in present use.

Things of a perishable nature are also privileged Exception from distress; and things which are liable to be things of a easily lost, or which cannot be identified: for when perishable a distress was a mere pledge, to be restored on the performance of the duty for the default of which it was taken, it became a rule, that those things only should be distrained, which could be removed and restored in as good condition as that in which they were taken.⁶ Thus, at common law, fruit, milk, and other things of a like perishable nature, were exempted under this rule: and money, unless it were in a bag, so that the same identical pieces might be mown.8 Neither could grain or flour be taken out of a sack; nor hay from a barn; for in these cases the exact quantity taken and the identity could not be ascertained.9 Nor could corn in the sheaf be taken, because the grain must be shed and scattered by removal; unless indeed it were found in a cart, in which it could be removed altogether without loss or miury. But as regards a distress for corn, this subject of the exception at common law has been altered by the statute 2 Will. & M. c. 5, which enables any person having rent in arrear upon any demise, lease, or contract, to distrain any sheaves or cocks of corn, or corn loose or in the straw, or hay lying in any barn or granary, or upon any hovel, stack, or rick, or otherwise, upon any part of the land charged with such rent: and this provision is held to extend to corn in whatever state it may be, whether threshed or unthreshed.2

Whatever is in a man's present use or occupation Exception of - is, during that time, privileged from distress; as a things in horse on which he is riding, or an axe with which present use. he is cutting wood: 3 the reason of which exception is, that an attempt to distrain things in such a situa-

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Co. Lit. 47, a; Gilb. Dist. 4; 3 Bl. Com. 7.

⁷⁸ Bl. Com. 9. ⁸ 1 Roll. Abr. 667; 2 Bac.

Abr. 109. 9 1 Roll. Abr. 667.

¹ Id.

² Bellasis v. Burbidge, 1 Lutw. 214.

³ Co. Lit. 47, a; Storey v. Robinson, 6 T. R. 138; Bin. don's (Viscountess) Case, Moor. 214.

tion might probably lead to a breach of the peace. On this principle it has been held that a loom cannot be distrained when in the actual use of the weaver, nor wearing apparel, if in actual use; but if it be put off, though only for the purpose of repose, the reason of the exception failing, it becomes liable to be taken as a distress.5 There is one old case6 in which it was held that horses drawing a cart loaded with corn might be distrained, with the harness, whilst the driver was riding thereon. But a dictum reported in that case has been overruled,7 and the whole decision questioned;8 and it is so much at variance with the principle of this present exception, and with all the cases in which the privilege has been allowed, that it appears to be of no authority at the present day.9

Exception of fixtures and things annexed to the freehold.

Whatever is annexed or affixed to the freehold, as kilns, furnaces, cauldrons, windows, doors, and the like, cannot be distrained: and this exception seems to rest in every instance upon one or more of three reasons; namely, first, because they are not personal chattels, but form part of the thing demised, secondly, because they cannot be taken away without doing damage to the freehold, and are therefore privileged for the sake of the place; and, lastly, because the things themselves would be injured by the severance and removal, and consequently could not be restored in as good condition as when taken. For this exception extends not only to all such things,

⁴Simpson v. Hartopp, Willes, 517; s. c. 1 Smith's Lead. Cases, 187. Watts v. Davis, 1 Selw. N. P. 676, 9th ed. ⁵Bisset v. Caldwell, Peake,

^{36.} Baynes v. Smith, 1 Esp. 206.

⁶ Welch or Webb v. Bell, 1
Sid. 422, 440; s. c. 2 Keb.
529, 596; 1 Vent. 36.

 ⁷ Storey v. Robinson, 6 T. R.
 138. See also Harg. note
 (293.) on Co. Lit. 47, a.

⁸ Willes, 517.
9 The reporter in Sid. 440,

makes a query whether if the man had been upon the cart the whole team would not have been privileged? but it is clear from Keb. that the man was in the cart at the time.

¹ Co. Lit. 47, b; Simpson v. Hartopp, Willes, 515; Niblet v. Smith, 4 T. R. 504.

² Gilb. Dist. 39, 4th ed.

⁸ Willes, 515.

^{4 4} T. R. 567.

⁵ Gilb. Dist. 38, 4th ed. See supra, 91.

ig to the heir, as the tenant will not be pero remove with him from the premises, (which fall within the first reason of the exception,)) to fixtures, which as between landlord and would be removable, (and which seem to owe remption to the second or third reason). pect there is a distinction between a distress execution, for under an execution these latter may be seized,6 there not being a like origin case of an execution-seizure to afford a like of privilege. A mere temporary removal, for s of necessity, of things annexed to the freeses not destroy the privilege. So that, as an a smith's shop, and a millstone in a mill are ed under this exception,7 a temporary removal invil out of the stock, or of the millstone out nill, for the purpose of its being picked, does der them liable to be distrained.

er this exception, at common law, growing d other crops were exempted from a distress, ntly for the second and third reasons above or the privilege; for as such crops, except leous produce, as grass or fruit upon trees, go executor, not to the heir, and are liable to be in execution, they cannot be considered as

[?]s Case, 1 Salk. 368; 3; 3 B. & C. 368. as been questioned, , whether machinery bolts to the floor of y can be distrained Duck v. Braddyll, 17; s. c. 13 Price. uestion which should depend upon whether) annexed to the freeto be a bond fide perfixture, (in which fact that it might be le by the tenant as ixture would be unat, see supra;) or , as was asked by B., in the case, the

bolts had no more to do with the machinery than to secure the stability necessary in the operations. If it were once proved to have constituted a bond fide permanent fixture, it is probable the court would infer damage to the freehold, and to the fixtures, by a severance, and would not weigh the reason of the privilege in the particular instance.

^{8 14} Hen. 8, 25 b; Bro. Abr. Dist. pl. 23. Gorton v. Faulkner, 4 T. R. 567.

⁹ l Roll. Abr. 666.

¹ Burton's Compend.332,n.

part of the thing demised:) but now by statute il Geo. 2, c. 19, s. 8, the landlord or lessor may take and seize all sorts of corn, and grass, hops, roots, fruits, pulse, or other product growing on any part of the land demised. Under this statute growing crops may be considered distrainable like goods and chattels.2 But they cannot, by its express terms, be sold till they are ripe.3 The words "other product." used in the statute, have been held not to extend to trees and shrubs growing in a nursery-man's ground, so as to take these out of the common law exception, but to be confined to product of a similar nature to those specified, that is to say, product to which the process of becoming ripe, and of being cut, gathered, made, and laid up when ripe, is incidental.4 It is evident from the words of the statute that the power of distress of growing crops is extended only to the case of landlords or lessors distraining on lands demised; so that, in the case of a rent-charge, the exception still exists in its original force; and if a power be inserted in a grant of a rent-charge in order to give the grantee the same capacity of distress in this respect as a lessor has under the above statute for a rent-service, the power must be very specific in its terms, for it will be construed strictly. Thus, where a power was given in a grant "to detain, manage, sell, and dispose of, the distresses in the same manner in all respects as distresses for rents reserved upon leases for years, and as if the annuity was a rent reserved upon a lease for years," it was determined that these words were fully satisfied by holding them to grant the powers which were given to landlords under the statute 2 Will. & M. c. 5, without extending them to the new subjects of distress granted by the statute 11 Geo. 2, c. 19.5

The other cases in which growing crops still con-

² Glover v. Coles, 1 Bing. 6; s. c. 7 Moore, 231. See also 2 B. & B. 367.

⁸ Owen v. Legh, 3 B. & Al. 470; 1 M. & W. 448. See post, c. 4.

⁴ Clark v. Gaskarth, 8 Taunt. 431 s. c. 2 Moore, 491. Clark v. Calvert, 3 Moore, 96. ⁵ Miller v. Green, 2 C. & J.

Miller v. Green, 2 C. & J. 143; s. c. 8 Bing. 92; 2 Tyrwh. 1.

red in the last chapter.6

o be privileged,—as, where they are in the r of the law, or have been sold under an exethe case of emblements to which a former at will is entitled; and the exemption under tute 56 Geo. 3, c. 50, s. 6,—have been already

wour of trade there are several exceptions to Exception in iteral rule: the reason of which exceptions is favour of trade blic good.

things delivered to a person exercising a trade, to be carried, wrought, or managed in y of his trade or employ, are not distrainable; h delivered to a tailor to be made up; yarn ed to a weaver to be wove; corn sent to a be ground; a horse standing at a smithey to ed:8 the carcase of a beast sent to a butcher's be slaughtered; 9 goods delivered to a common for the purpose of conveyance; 1 goods of a al in the hands of a factor for sale; 2 and sent to an auctioneer to be sold on his own es.3 In like manner, goods landed at a wharf, nsigned to a broker, as agent of the consignor, and placed by the broker in the wharfinger's ouse over the wharf, for safe custody until an unity of selling them should occur, have been ot to be distrainable for rent due in respect of arf and warehouse: 4 and corn sent to a factor e, and deposited by him in the warehouse of a y keeper, he not having any warehouse of his under the same protection against a distress it, as if it were deposited in a warehouse of tor himself.5 So the cattle and goods of a

e, p. 84, 5, 6, 7.

nd v. Clarke, 1 C. & J.

c. 1 Tyrw. 314; and

oson v. Hartopp, Willes

T. R. 568.

Lit. 47; 3 Bl. Com.
Lit. 47; 3 Bl. Com.
Lit. 47; 3 Bl. Com.
V. Shevill, 2 A. &
L. S. C. 4 N. & M. 277.
Lourn v. Hurst, 1 Salk.

² Gilman v. Elton, 3 B. & B. 75; s. c. 6 Moore, 243.

³ Adams v. Grane, 1 C. & M. 380; s. c. 3 Tyrwh. 326.

⁴ Thompson v. Mashiter, 1 Bing. 283; s. c. 8 Moore, 254.

⁵ Matthias v. Mesnard, 2 C. & P. 353.

guest at an inn are in like manner privilege distress; for they are there necessarily in the trade, and an inn being a place publici juris, have a right to use it without molestation. true principle of this present exception seems that where in order to the exercising of a trade at a given place it is necessary that the should be delivered into the custody of the carrying it on there, the law, in consideration benefit which the commonwealth derives free carrying on of the trade, protects from distriguous so delivered. And all the instances for the books, which are those given above, are chattels delivered to be dealt with by the third in the way of his trade, under circumstances in

its true footing. Inc reasoning seems to be in all cases, as it was most; for even in the an innkeeper, the enj by a customer of a (sory authority of law his premises may cons good reason for th keeper's correspondin to detain the customer' for his bill, but it can reason for the enjoyn the customer of anothe namely, a privilege fro tress for his goods. I of the instances of th vilege to say that the are at the trader's by au of law can merely mean the protection of the (which is giving the rul for the reason of the ru rather this expression in contradistinction fr authority in fact; n scribing a legal com: but a legal licence; s would amount to an for a trespass. See 1 W. 656.

⁶ Robinson v. Walter, 3 Bulst. 269.

⁷ That is to say, "that they must be placed there if the public, who choose to become their customers, are to have the full benefit of those trades, in the mode in which the traders choose to carry on their trade, and have held themselves out to the public as carrying it on." Per Parke, B. Muspratt v. Gregory, 1 M. & W. 657.

⁸ Per Alderson, B., Id. 646. It seems to have been formerly attempted, and with some success, to put this present exception on the ground of compulsory authority of law. It was argued, that all the cases in which the privilege obtained were cases in which the trader was compellable to receive the goods of the customer, and that this compulsory authority of law constituted the reason of the privilege. But this idea appears now to be wholly exploded, and the exception put upon

le could not be carried on at the place unless ds were so delivered. This privilege has ne to time increased in extent, according to modes of dealing established between parties change of times and circumstances, one of nodern modes of dealing is the case of a and another that of an auctioneer. Nor privilege occasion any hardship to the landause it is generally applicable to goods which cossibly be supposed to be the property of the

But the courts have repeatedly refused to the privilege further in favour of public conthan to the cases of goods so necessarily , as in the above instances. Therefore it theld, that though materials delivered by a turer to a weaver to be manufactured by his own house were privileged from distress due from the weaver to his landlord; vet ame or other machinery delivered therewith. purpose of being used in the weaver's house anufacture of such materials, was not in any ileged under this exception. And in a case. alt was manufactured and publicly sold at alt works, and carried away in boats of the rs, which came for the purpose of being nto a cut or canal on the premises, commuwith a public navigation, the boat of a cusring in the cut or canal for the purpose of and carrying away salt bought by him, was be distrainable for rent.4 It has also been t a carriage standing at livery in the coacha common livery-stable keeper is liable to

Iderson, B., Id. It seen observed that of the third person ally one which condealing with other ds. Per Lord Abin., Id. 660, 662. syley, B., Adams v. 3. & M. 388.

² 3 Bl. Com. 8.

³ Wood v. Clark, 1 C. & J. 484; s.c. 1 Tyrwh. 314; approved in Fenton v. Logan, 9 Bing. 676.

⁴ Muspratt v. Gregory, 1 M. & W. 633, Parke, B. dissentiente: confirmed on error, 3 M. & W. 677.

be distrained by the landlord of the pren in the case of an inn, where the innkeepe horse into a stable, situate at a consider from his inn, and which had been lent tenant of it for the race-week, it was a the privilege could not extend to this state consequently the race-horse was distrain landlord of the stable.

Where things are privileged under thas in the instances given above, the exe distress is not lost by length of time, remain fairly under the same circumstance.

⁵ Francis v. Wyatt, 1 Wm. Bl. Rep. 483; s. c. 3 Bur. 1498. This has been thought an extreme case; and it is certainly difficult to reconcile it with some of the later decisions, particularly those of the warehouseman and the granary-keeper. It appears to have been decided on the ground that the owner of the carriage was quasi permanent sub-tenant of so much of the premises: but it was decided at a time when this exception was much less clearly defined than at present, and the case appears to have been considered, not so much with respect to any analogy which might exist between it and the cases of other trades, as on the ground of its want of analogy with the case of an inn, where things are by the compulsory authority of (See supra, 96. n. 8.) But if a man keep a public livery stable, and it be in the direct course of his ordinary exercise of his trade to receive horses and carriages of the public to stand in his stables and coach hor to let out hi public to hire believed, is frec at the presen scarcely be do: riage committ under such would now be distress. Suc warehouseman carriages. See servations on Patteson, J., 2 6 Crosier v. Ld. Ken. 439 472. It is Court of Chan grounds used ought to have conferring the as the inn Woodf. L. & ed. And th reason to sur mises fairly an forming part would be other by a court of appears nothin of the above of contrary opini

etained by the tenant for his satisfaction in the has done about them. ivilege of things delivered to a person expublic trade, to be carried, wrought, or in the way of his trade or employ, gives other exception to the general rule as acit; by which whatever is employed in r fetching away any goods under such cirs is privileged equally with the goods themthe horse or carriage which conveys them, asket or package in which they are en-Thus, where a horse has carried corn to he may be tied to the mill-door during ng of the corn, under the protection of ge in favour of trade.9 And even in a case othier went with his horse to fetch yarn ver's, to whom he had delivered it to be because the weaver had no beam or weights he yarn, carried it to the private house of r to be weighed, it was held that the horse ged from being distrained by the neighllord for rent of the premises.1

r. 668; 2 Bac. Ń. 646, 7. 50. Burley, Cro. Eliz. Walmsly, J., dis-But this case is stumbling-block, ndmark, of the ow under con-It has been frestioned, though iled; and there is anxiety on the Courts to put the the ground of the in the possession use of the owner . But this was reason of it, as For though the held by all the court (550), and the horse by Owen, J., (596) to be privileged also on this ground; yet the principal and true reason given by the court for admitting the privilege of both was, that the trade of a clothier being probono publico he ought to be allowed all necessary means; that yarn at a weaver's to be spun, and a horse there bringing or fetching it, are not distrainable: and that as the weighing is as necessary as the spinning, the horse and yarn were privileged pro bono publico in the way of trade. It must be allowed that after these observations the case was adjourned a second time, and that the reasons for the judg-

Another exception in favour of trade case of goods or cattle in a public fair where they are privileged from distress, maintenance of the fair or market is for good.² So it is said that a horse which to market, and is put into a private yard corn is being sold, cannot be distrained th the purpose of bringing the horse wa publico.8 And cattle are said to be privile on their way to, as at, such public fair Thus, it is said to have been held that sequence arising out of the necessity f freshment on their passage, they are during any temporary agistment on the 1 in a case where beasts, being driven grazed one night on land in their way t it was argued that their being on their w ket, for the supply of so great a city, shou them from distress, it was resolved tha not; because then such privilege must exte the whole kingdom, which would lay 1 restraint on landlords.5

ment ultimately given are not reported. But as far as the report goes, it is to be remarked, that as an authority for an exception in favour of trade, the case cannot be relied on too little at the present day; the fact of the owner of the horse being himself a trader, which is dwelt on by the court, seems to have nothing to do with the case (see per Parke, B. 1, M. & W. 651); and the result of the subsequent decisions seems rather to agree with the opinion of Walmsly, J., that the subjects of the distress would have been privileged in favour of trade only in case the premises had been a place where a common beam was kept for public use.

² Co. Lit. 47, 668; 1 M. & W ³ Read v. Burl 550, 596. Sed

⁴ 2 Saund. 29 and *Tate* v. *Gle* 24 G. 3, there ci 1 M. & W. 647.

⁵ Fowkes v. J 260. "Therefo way is to drive t public inn." G 4th ed. It see two last propos only on the dic v. Burley, and th case of Tate v. G were so distinct in 1 M. & W. the case of Fou is misquoted as for the very cont it really decides.

Next, as to things which are privileged from dis- Exception tress conditionally, or sub modo, that is to say, pro-sub modo of vided there be other sufficient distress upon the the tools of t wided there be other sufficient distress upon the tenant's trad premises. These are the tools and utensils of a and his imp man's trade, as the axe of a carpenter, the books of ments of hi a scholar, and the like; and the implements of hus-bandry, inclu bandry, including beasts of the plough, and sheep.6 ing sheep and The reason of this rule, in its origin, seems to be, beasts of the plough. that at common law, when the distress was a mere pledge to compel the payment of the rent, those things were looked upon with more favour, which were probably the chief means possessed by the party distrained upon to gain his own livelihood, and to satisfy the demand of the distrainer.7 It is evident that many of the things conditionally excepted under this privilege, may frequently happen to be absolutely excepted from being in actual use, another and independent ground of privilege, which we have already considered.8 The sheep of the tenant, and his beasts of the plough are privileged, as well under this exception at common law (being considered, as it were, instruments of husbandry, and necessary to plough, and manure the land,) as by the statute De districtione scaccarii,9 which enacts that no man shall be distrained by the beasts of his plough, or his sheep, either by the king or by any other, whilst there is another sufficient distress. Of course whenever the other goods upon the premises are not sufficient to satisfy the distrainer's demand, this exception fails, and the utensils of trade and implements of husbandry may be taken indifferently with the other effects.1 And it has been decided, that a disress of implements of trade was good in a case

⁽the propositions, however, very strong. Sed

Co. Lit. 47, a.; Gilb. Dist. 6. Gorton v. Falkner, 4 T. R. 65; Willes, 515.

⁷ 8 Bl. Com. 9; Willes, 515. 8 Ante, 91.

⁵1 Hen. 3, st. 4, enforced

by the Articuli super chartas, 28 Edw. 1, st. 3, c. 12. See

¹ Wood v. Clarke, 1 C. & J. 484; s. c. 1 Tyrw. 314: Fenton v. Logan, 9 Bing. 676; s. c. 3 M. & Scott, 82; Willes. 54; 4 T. R. 568.

where there were no other chattels on the except the furniture of some lodgers, which trainer did not take. Lord Kenyon said, trainer acted humanely and properly in not di the goods of the lodgers, he had a right them, but it would have been cruelty and in have exerted that right while the implement were on the premises.2 So a landlord has l entitled to distrain beasts of the plough, wh was no other sufficient subject of distres premises besides growing crops: for he sidered to have a right to resort to those si distress which are immediately available to arrears of rent by sale, and not to be boun those which cannot be productive till a futur In order for a distrainer to determine whet he shall be justified in taking things privi modo, it is merely necessary for him to as the time of the distress, by using reasonable in the appraisement, whether according price, in fair judgment, the other effects be sufficient to satisfy his demand; and if on such valuation that they will not, he v liable for distraining the things conditio vileged, though it should turn out upor judging by the result, that there would l enough without them.4 And where bea plough are once lawfully taken, the sale need not be postponed to that of other goo

Exceptions and

Lastly, we shall consider the exceptions distinctions as tinctions which exist as to distraining the

² Roberts v. Jackson, Peake, Ad. Ca. 36. This seems rather a strong case; and the argument used by his lordship in the decision of it, appears, as reported, to be founded on a mistake, and would go to destroy this conditional privilege altogether at the present day. It has in effect been considered as putting the

privilege on a ver ing, see Har. W Tent. 3rd ed. But as subsequently la Parke, B. 1 M. & 3 Piggott v. Bir

W. 441.

⁴ Jenner v. Yolla 167; s. c. 6 Price 5 Id. See post,

stranger which escape into the land. Thus where to distraining the cattle of a stranger stray into the land without the cattle of their owner's knowledge or default, through defec-stranger wh tive or insufficient fences, which the tenant or his escape into the land. hadlord ought to repair, they cannot be distrained by the lessor for rent reserved, until they have been levent and couchant upon the land, and until actual notice has been given to the owner, and he has refused or neglected to drive them away. The privilege to this extent in the present instance seems to be given on account of the default of the lessor; for if the land had been in his own hands, he must have repaired the fences; and when he put in a lessee, he ought to have obliged him by covenant to repair; so that to allow him to distrain under such circumstances would in effect be permitting him to take advantage of his own wrong. But as the same reason cannot obtain, so the restriction is said not to extend to the grantee of a rent-charge, nor to the lord distraining for an ancient rent, for they have nothing to do with the fences, and therefore an express notice to the owner from them is not necessary. However, even in these cases the stranger's cattle must still, it seems, be so long resident on the land out of which the rent issues, that notice may be presumed to the owner of them, that is, they must be levant and couchant, or bying down and rising up on the premises, for a night and a day, without pursuit being made by the owner of them,-for he may during such time retake them before the distress is made.7 If a stranger's cattle

⁶ Kimp v. Cruwes, 2 Lutw.

cient rent may distrain cattle which come in by escape, although they have not been levant and couchant; see 1 Byth. Convey. by Jarm. 611; citing 1 Ld. Raym. 167. Argu. 9 Vin. Abr. 144, n.; 1 Roll. Abr. 668, pl. 2, 3. And Co. Lit. 47, b. says in general terms that beasts that escape may be distrained for rent, though they have not been levant and couchant; but

^{7 1} Roll. Abr. 668, 9; Kimp v. Cruwes, 2 Lutw. 1577; Kemp v. Crews, Ld. Raym. 168; Gill v. Gawin, 2 Roll. Rep. 124; Anon. 2 Leon. 7; Doct. & Stud. c. 7; 3 Bl. Com. 8, 9. Harg. note (3) on Co. Lit. 47, b.; Wms. Saund. 290, n. (7). There is some authority for saying that the lord of the fee for an an-

escape into another's land by breaking the fences where there is no defect in them, or if the tenant of the land where the distress is taken is not bound to repair the fences, though there is a defect in them, the cattle may be distrained for rent immediately, before they are *levant* and *couchant*.8

m clusion.

í

Such appears to be the amount of exceptions to the general rule, arising from the nature of the things themselves, and from the circumstances under which they are found: so that, by attending to the details of this present chapter, and of the last section of the preceding one, it will be easy to determine in all cases, as well on whose possession, and of whose effects, as of what particular things, a distress for rent may be made.

CHAPTER IV.

OF THE PROCEEDINGS IN DISTRESS FOR RENT.

Sect. 1. Distress for rent when to be made; and herein of rent when in arrear, and of the amount for which a distress may be taken.

Sect. 2. Distress for rent where to be made; and

herein of fraudulent removal.

Sect. 3. Distress for rent how to be made; and herein of the course to be pursued by the landlord when the goods are already in the possession of the law under an execution.

Sect. 4. Distress for rent how to be treated; and herein of the impounding.

Sect. 5. Distress for rent how to be disposed of.

Sect. 6. Expenses of a distress for rent.

the above authorities show that this rule is not correct, as thus generally laid down, no books warranting it, except 7 Hen. 7, 1, 2, and 10 Hen. 7, 21, b.

As to the above rule in regard of the grantee of a rent charge, it has been remarked that it is rather singular, the grantee should be in a better situation than the person who granted him the power of distress. 1 Byth. Conv. by Jarm. 611.

⁸ Co. Lit. 47, a., and Harg. note (301) thereon.

SECTION I.

Distress for rent when to be made; and herein of rent when in arrear, and of the amount for which a distress may be taken.

Before entering upon the proceedings in a distress for rent, and considering first of all the time when it may be made, it seems advisable to examine in this place the preliminary questions of when rent becomes in arrear, and of the amount for which a distress may be made.

To ascertain the precise period when rent becomes Rent when in arrear is very important, not only as showing when in arrear. a distress may be properly made, but also as proving, in case of the death of a tenant of a rent-charge for an estate of inheritance, or of a tenant of a rent-service having a reversion of inheritance in the land out of which it issues, when the rent, as not yet accrued, shall go with the reversion to the heir, and when, as already in arrear, it shall go to the executor as part of the personal estate.⁹

The period at which rent may be considered to be due must depend upon the contract, either express or implied, between the parties; the only difficulty in all cases being the construction of the contract.

When rent is reserved generally, and no mention is made, as is usual, of half-yearly or quarterly payments, nothing becomes due until the end of the year.\(^1\) So where, after a written agreement for hiring premises at a yearly rent had been signed, the landlord asked the tenant how he would like to pay his rent, to which the tenant replied, quarterly; it was held, although quarterly payments accordingly were proved, that a distress for a quarter's rent was illegal, there being no new terms of letting, and the original agreement being unaltered.\(^2\) In a case where rent was reserved quarterly, or half quarterly if required, it was decided that the landlord having

See ante, p. 60, et seq.
 Latch. 264.
 Turner v. Aliday, 1 Tyr.
 Gr. 819.

received the rent quarterly for a twelvemonth, could not, without previous notice, distrain for a half quarter's rent. Where by an agreement dated the 8th of September, a house was let for seven years at an annual rent, payable quarterly, the first payment to be made on the 25th of March following, it was held that a quarter's rent only became due on the 25th of March.4 When rent is made payable on certain stated days in the year, it becomes due on the first of the days occurring in point of time, without any regard to the local order of the words.5 It may be scarcely necessary to add that the "four usual days, or feasts," are understood to mean Lady-day, Midsummer-day, Michaelmas-day, and Christmas-

It may sometimes happen that, by the terms of the reservation, the tenant has a time of grace given him for the payment of his rent. Thus, we have seen, that when rent is reserved payable at either of two periods at the election of the lessee, as at the feast of St. Michael, or within one month after, or at the four usual feasts, or within thirteen weeks after.7 it is not considered to be in arrear till after the last period limited for its payment. And where rent was reserved payable at the feast of St. John the Baptist, and at Christmas, or fourteen days after, the first payment to be made at Christmas next after the date, it was decided that the tenant had fourteen days after the first Christmas, as well as every other, to pay his rent in.8 But it has been held that if rent be made payable at Lady-day and Michaelmas, or within ten days after every feast, and the lease expire at Michaelmas, the last payment then becomes due

³ Mallam v. Arden, 10 Bing.

⁴ Hutchins v. Scott, 2 M. & W. 809.

⁵ Hill v. Grange, Plowd.

⁶ Ante, 59; Pilkington v. Dalton, Cro. Eliz. 575; Clun's case, 10 Co. Rep. 127, a;

Anon. 2 Shower, 77; Blusden's case, Cro. Eliz. 565; Thompson v. Field, Cro. Jac. 500; Josselin v. Josselin, 4 Leon. 19.

⁷ Clun's case, 10 Co. Rep. 127, a.; s. c. Cro. Jac. 309; 4 Leon. 247. ⁸ Anon. 2 Shower, 77.

on that day, and before the end of ten days; for the law rejects the ten days after the last Michaelmas out of the term, rather than the lessor should lose the remedy for his rent.⁹

A covenant that half a year's rent shall remain in the hands of the tenant till the last year, means the "current half year." 1

Not unfrequently the rent is payable in advance: as, where by the custom of the country half a year's rent becomes due upon the tenant's entry on the land: in this case a distress may be made for it immediately; for the custom is an implied agreement. So by express contract; as, where premises were demised by lease dated the 21st of March, to hold from the 25th of March for seven years wanting seven days, at a rent payable by quarterly payments on the 25th of March, and the three other usual days of payment, commencing from the 25th of March then instant, the reservation was construed to be of a beforehand rent, whereof the first payment was to take place on the 25th of March, the day of the commencement of the term.³ But in a case where a house was let for twelve months at the yearly rent of 80l., the rent to commence at Michaelmas, and to be paid three months in advance, such advance of 201. to be paid on taking possession; Lord Ellenborough thought that the agreement for the advance was confined to the first quarter only, as otherwise it would have been easy to have said "always paid in advance."4

If the rent be of a particular kind the period when it becomes due may sometimes depend upon the

⁹ Barwick v. Foster, Cro. Jac. 227, 233, 310; s.c. Yelv. 167; 1 Brownl. 105; 2 Id. 220; 1 Bulst. 1; recognized by the court in Bayly v. Murin, 1 Vent. 245. Gilb. Rents, 53. As to distress after the expiration of the term under statute 8 Anne, c. 14, see ante, p. 12, and post, 120, 1.

¹ Nicholls, ats. —, Loft. 393.

² Buckley v. Taylor, 2'T. R. 600; M'Leish v. Tate, Cowp. 781; Tracey v. Talbot, 6 Mod. 214.

³ Hopkins v. Helmore, 3 Nev. & P. 452.

⁴ Holland v. Palser, 2 Stark. 161.

nature of the render; as where it consists of the render of a rose, a distress cannot be made till the season when roses are blown.5

Where rent is payable only on a condition precedent, it does not become due till the condition is fulfilled. As, where a furnished house was hired at a yearly rent for the house and furniture, and the tenant took possession when it was furnished only in part, under the agreement that it should be completely furnished, though no time was specified; it was held, that the reservation was conditional, and that no rent became payable till the remainder of the furniture was sent in.6

As to the hour of the rent-day at which the rent is considered due,—although the time of sun-set is the hour appointed by law to demand rent, in order to take advantage of a condition of re-entry, or to tender it in order to save a forfeiture, yet,—the tenant has to the last minute of the natural day to pay it; and consequently it is not in arrear till after midnight.7 Therefore, where a lessor, tenant in fee, died after sunset and before midnight, it was held, that the heir and not the executor was entitled to the rent: 8 but payment on the morning of the rent-day, the lessor dving before noon, is valid as against the heir, though not as against the king.

of the amount ess may be ıade.

With respect to the amount of rent for which a or which a dis- distress may be made, this, like the time when it becomes due, must depend upon the terms of the reservation or grant; and according to such terms, whatever can be properly considered as an ascertained part of the rent, in arrear and unpaid at the time, may be distrained for.

> Where a party entered into possession of certain premises, subject to the approbation of the landlord,

⁵ Lit. sec. 129.

⁶ Mechelen v. Wallace, 7 A. & E. 54, n.

⁷ Co. Lit. 47, b.; Cutting v. Derby, 2 W. Bl. 1077; Leftly v. Mills, 4 T. R. 173;

Duppa v. Mayo, 2 Saund. 287; s. c. 2 Salk. 578. 8 Duppa v. Mayo; and see

note 17, Clun's case, 10 Co. Rep. 127.

which he afterwards obtained by agreeing to pay an advanced rent from the time he came into possession, it was determined that the landlord might distrain for the whole sum accrued, as well for the time before as for the time after the agreement; the court holding that the subsequent agreement should by relation operate to make it a reservation of that certain rent from the beginning.⁹

There is a difference which must be remarked between a case of rent reserved entire upon a demise of several things in the same lease, and a case of rent not at first reserved entire under such circumstances, but which upon the reservation is several, and apportioned to the several things demised: thus for instance, where a lease is made of several houses. rendering the annual rent of 51. at the two usual feasts, viz., for one house 3/., for another 10s., and for the rest of the houses the residue of the said rent of 51.: this is but one reservation of one entire rent: because all the houses were leased and the 51, was reserved as one entire rent for them all, and the viz. afterwards does not alter the nature of the reservation, but only declares the value of each house: but where the lease is of three houses rendering for one house 31., for another 20s., and for the third 20s.; these are three several reservations, and in the nature of three distinct demises; and each house in this case is only chargeable with its own rent; for here the entire sum is not at first reserved out of all the houses demised, and afterwards apportioned to the several houses according to their respective value, as in the former case; but the particular sums are at first reserved out of the several houses, singly and independently of each other.1

As the distress must be conformable in every respect to the nature of the reservation and demise,

⁹ M'Leish v. Tate, Cowp. 781.

¹ Gilb. on Rents, 34; Winter's case, 2 Roll. Abr. 448; Tanfield v. Rogers, Cro. Eliz.

^{340;} Lee v. Arnold, 4 Leon. 27; Hill's case, 4 Leon. 187; Knight's case, Co. Rep. 54; Moore, 202.

amounts severally accruing due under separate demises must not be united in a single distress. Even where two separate demises are contained in the same deed, a joint distress should not be made for the two several rents.² So if a tenant hold up to a certain period under one demise, and afterwards his possession be continued under another, although each demise be made only by parol, a joint distress should not be made for the rent accrued under the two demises.3 However if a parol lease be made, from year to year, as long as it shall be agreeable to the parties, and the lessee occupy during ten years, this by computation from time past makes an entire lease for so many years; and if rent be in arrear for part of one of those years and part of another, the lessor may distrain as for so much rent in arrear upon an entire lease, and is not obliged to make separate distresses as for several rents due on different demises.4

But wherever the rent distrained for consists of several amounts, which fell due at different times, several distresses may be lawfully made for it. 50 in a late case, where to a declaration for an excessive distress for rent, the defendant pleaded that the whole sum distrained for was due and in arrear, concluding to the country, on which the plaintiff joined issue; it was held that on this issue the defendant was not precluded from insisting on certain arrears, by the fact that since they became due other arrears had become due and had been distrained for; and this, although on the first distress the warrant and notice stated the distress to be for rent due up to a day named, being a time subsequent to the day on which the arrears relied on by the defendant in support of the issue accrued.6

² Rogers v. Birkmire, Reptemp. Hardw. 245; Tanfield v. Rogers, Cro. Eliz. 340.

³ Stanfield v. Hicks, Ld. Raym. 280.

⁴ See Legg v. Strudwick,

² Salk. 414; Birch v. Wright 1 T. R. 380.

Anon. Moore, 7. Palmer
 v. Strange, 1 Lev. 43; s. c.
 1 Sid. 44.

⁶ Gambrell v. Falmouth, (Earl), 4 A &. E. 73.

for what Amount to be made.

On the other hand, where the rent intended to be made the subject of a distress is entire, the whole amount due must be distrained for at once, if sufficient goods can be found upon the premises; for various distresses are vexatious to the tenant; and if an entire sum be split, and part of it be distrained for at one time, and part of it at another, the second seizure will be illegal. But if the entire sum due be distrained for, and there be not sufficient goods found upon the premises at the time,8 or the distrainor merely mistake the value of the things seized, he may afterwards complete his remedy by making a second seizure.9 And this provision, in the latter case, is calculated as much for the benefit of the tenant, as for that of the landlord; for if a person were not permitted to distrain a second time under such circumstances, it might reduce him to the necessity of taking effects of very great value on the first seizure; which in things of an uncertain or imaginary value, he might do without being guilty of making an excessive distress; and this would be far more prejudicial to the tenant, than to allow a second distress to be made.1

In the statute 17 Car. 2, c. 7,—passed for the pro- 17 Car. 2, tection of landlords, in cases where after a distress s. 3. has been replevied the tenant has become nonsuit, or has had judgment given against him on demurrer, by simplifying the mode of proceeding in such cases in manner there pointed out,—an express provision is made for enabling landlords, in all cases within that statute, to make a second distress, if the cattle originally taken shall not be found sufficient to meet the arrears due.²

It may happen that the amount, which has or would otherwise have fallen due, may have been re-

⁷ Wallis v. Saville, 2 Lutw. 1536; Hutchins v. Chambers, 1 Burr. 589; Anon. Moore, 7.

⁸ Wallis v. Saville, 2 Lutw. 1536; Anon. Cro. Eliz. 13. ⁹ Hutchins v. Chambers, 1

Burr. 579.

¹ Per Lord Mansfield,

Hutchins v. Chambers, 1 Burr. 589.

² 17 Car. 2, c. 7, s. 3. All the sections of the statute speak of goods or cattle distrained, except the third section, which mentions cattle only.

duced by part payment previous to the distress: and this may be, not only by a direct and actual payment to the landlord himself, but also by such a payment of those liabilities of the land which should have been paid by the landlord, as the law will consider a payment of the tenant's rent. Thus, by the terms of the general Land-Tax Act, "the tenants of all houses, lands, tenements, and hereditaments, which shall be rated by virtue of the Act, are required and authorized to pay such sum or sums of money as shall be rated upon such premises, and to deduct out of the rent so much of the said rate as in respect of the said rents the landlord ought to bear; and the landlords both mediate and immediate are required to allow such deductions and payments upon the receipt of the residue of the rents." A payment of the land-tax, therefore, by the tenant, is justly considered to be a payment of so much of his rent.4 In like manner, a compulsory payment of ground-rent by the tenant, in default of payment of it by the mesne landlord, is held to be a good payment of so much of the tenant's rent.5 case of a tenant's compulsory payment of an annuity charged upon the land, it was decided to be a good plea to the landlord's avowry for rent, that before the landlord had any thing in the premises, a rentcharge had been granted out of the land, that it was in arrear, and that the tenant paid it under threat of a distress.⁶ So, indeed, it has been laid down as a general rule that whenever a tenant might be ousted from his occupation in default of a payment

³ 38 Geo. 3, c. 5, s. 17. Similar enactments were made with respect to the property tax, when in existence.

⁴ Andrew v. Hancock, 1 B. & B. 37; Saunderson v. Hanson, 3 C. & P. 314; Carter v. Carter, 5 Bing. 406; s. c. 2 M. & P. 723. And a payment of property-tax by the tenant formerly was considered in

the same light. Clennell v. Read, 7 Taunt. 50; s. c. 2 Marsh. 371.

⁵ Sapsford v. Fletcher, 4 T. R. 511; Doe v. Hare, 2 C. & M. 145; Carter v. Carter, 5 Bing. 406; s. c. 2 M. & P. 723.

⁶ Taylor v. Zamira, 6 Taunt. 624.

made by him, he may pay in his discharge, and for the redemption of the premises, and set off such payment against rent due from him to his landlord.7 For in all the above instances the land is the debtor; the landlord must have paid the demands had he been himself in possession; and whenever he does pay them, must be supposed to do so out of the proceeds arising from the land: so that as the tenant's rackrent may be considered as representing the whole yearly profits, any demand upon those profits, answered by the tenant for the landlord, may fairly be looked upon as merely a handing over by him of so much of the annual proceeds of the land. It seems to be for this reason that the law considers such payments in the light of actual payments of so much rent, and not as simply forming the subjects of a cross demand.8 If, after the amount of rent due has been wholly discharged or reduced by such payments, the landlord distrain for the whole amount reserved, he will be liable to an action on the case. or of trespass, or the tenant may replevy the goods, as the case may be.9 It has been decided that growing rent may be discharged by such payments as well as rent already due. The payment by the tenant must be a compulsory payment; but a payment of ground-rent by the terre-tenant has been held not to be less compulsory because the ground-landlord gave him time for such payment.² Whenever any such payments are made on behalf of the landlord, they should be deducted from the rent of the current year; for the tenant will be able to derive no future advantage from them, if instead of treating them as payments of so much of his rent already in arrear, or then growing, as the law considers them, he allow them to accumulate, and pay his rent in full in the

appropriation of so much of the rent. See infra.

⁷ Smith v. Pearce, MSS. Har. Woodf. Land. & Ten. 286, 3rd ed. But in order that such a payment may decrease the amount for which the landlord may distrain, it must amount to a payment or

⁸ Carter v. Carter, 5 Bing. 406; s. c. 2 M. & P. 723.

⁹ Id. See post, c. 7.

¹ Id.

² Id.

quit his house "as soon as he could possibly get another situation," but did not give up possession accordingly, though he found and removed to another house, the notice was considered to be too vague, as merely meaning that he would quit when convenient; and the case was decided not to be within the statute. It has been determined that whether the tenant hold under a lease or under a parol demise he is equally within the provisions of the statute; and that it is immaterial whether the tenant's notice be in writing or by parol, 4 that is to say, in those cases where the tenancy may be determined by a parol notice. But it is said, and it appears to have been so decided, that the statute does not extend to a weekly tenancy;

4 Timmins v. Rawlinson, 3 Burr. 1607; s. c. 1 W. Bl. Rep. 533. As to how a tenancy may be determined, see Har. Wood. L. & Ten. 211. et seq., 3rd. ed.

where the notice was given by the landlord, decided that a tenant from week to week was not within that statute. But the statute now under consideration, which makes the tenant liable to pay double the former rent, to be levied, sued for, and recovered, like the former single rent, if he continue in possession after he himself has given the landlord notice of his intention to quit, by its express terms extends to all tenants capable of determining their tenancy by due notice, and consequently to tenants from week to week. It is submitted, therefore, that the case of Sullivan v. Bishop, if really, as it appears, a case of double rent, distrained for under this latter statute, after notice given by the tenant (and it certainly so appears, for otherwise the increased amount could not have been distrained for at all, and no objection seems to have been taken to the distress on that account), is not a correct

³ Farrance v. Elkinton, 2 Camp. 591.

⁵ Har. Woodf. Land. & Ten. 299, 482, 3rd ed. citing Sullivan v. Bishop, 2 C. & P. 359, (Best, C. J.) decided on the authority of Lloyd v. Rosbee, 2 Camp. 453, (Ellenborough). The mistake appears to have arisen from confounding the statute now under consideration, 11 Geo. 2, c. 19, s. 18, with the statute 4 Geo. 2, c. 28, s. 1 (supra, p. 115. n. 1). The former makes the tenant liable to pay double the yearly value of the premises, to be recovered by action of debt only, if he continue in possession after notice to quit given by the landlord, and by its express terms it extends only to tenants for life, lives, or years; and upon this ground the case of Lloyd v. Rosbee, in an action for double value,

for what Amount to be made.

however, it is submitted that there is no ground whatever for such a doctrine, as a weekly tenant is most clearly within the words of the act. If the landlord accept the single rent after the double has accrued due, it seems to be a waiver of his right to recover the double rent.6

The utmost arrears of rent which can in any case be recovered are now limited by the statute 3 & 4 Will. 4, c. 27, s. 42. It enacts, that no arrears of rent, or interest in respect of money charged on rent, or damages in respect of arrears, shall be distrained for, but within six years next after the same shall have become due, or next after an acknowledgement of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable or his agent.

It must be very evident how important it is to the distrainer to ascertain precisely for what amount of rent he is entitled to distrain, as it is impossible for him otherwise to proceed with safety. We have already seen that if he distrain for too little, that is to say, for part only of an entire rent, he loses his remedy for the remainder:7 and that if he seize for too much, he will be liable to an action on the case for distraining for more rent than was due.8 In the latter case he will also be in danger of being guilty of making an excessive distress:9 and in some instances, as where the tenant previously tenders the amount really due, or that amount has, to the distrainer's knowledge, been previously wholly cancelled by payments of ground-rent, land-tax, &c., he may become liable for making a distress altogether wrongful.1

But the consideration of these remedies of the tenant, and of the cases in which they are available. will form the subject of a subsequent chapter: at

decision; and that the case of Lloyd v. Rosbee was not in

⁶ Doe v. Batten, Cowp. 243.

⁷ See *supra*, p. 111.

⁸ See supra, p. 113, and post, c. 7.

⁹ See post, c. 7.

¹ As to a wrongful distress, see post, c. 7.

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present, having shown when rent becomes due, and the amount for which a distress may be taken, we proceed to the more immediate business of this chapter and section, the consideration of the time when a distress may be made.

Demand of ent previous o a distress.

A previous demand of the rent is seldom necessary: for even where there is a clause in a lease, that the lessor may distrain for the rent, "being lawfully demanded," notwithstanding these words, the lessor may distrain for the rent when due without any previous demand, the very making of the distress being considered as a legal demand of itself, because the tenant ought to be at hand to pay his rent.2 But if, instead of these general words, "being lawfully demanded," the reservation be such as expressly to require a special demand, which the distress itself cannot satisfy,—as if the clause be, that if the rent be behind it shall be demanded at a particular place not on the land, or be demanded of the person of the tenant,then such previous special demand becomes necessary to support a distress.3 And in the case of a distress for a nomine pænæ a previous demand is requisite, because a tenant, not knowing whether or not his landlord will insist on the penal rent, is not bound to be ready to pay before notice; but the distress may be good for the rent itself, if still in arrear, without such demand, provided the reservation be general.4 If the rent be so reserved as to make a previous demand necessary, together with a nomine pænæ, payable at different times, a separate demand for each must be made at such respective times.⁵ In a case where rent was reserved payable quarterly, "or half quarterly if required," and the landlord received the rent quarterly for the first year, it was held that he

² Kine v. Dunnery, Hutt. 23; Browne v. Dunnery, Hob. 208; Mallam v. Arden, 10 Bing. 299; s. c. 3 M. & Scott, 763. In such case, however, it may be advisable to make a previous demand, although not absolutely necessary to do so. Bac. Abr. Cond. O. 2.

⁸ Browne v. Dunnery, Hob. 208; Kidwelly v. Brand, Plowd. 69.

⁴ Howell v. Sarnback, Hob. 133; Mallam v. Arden, 10 Bing. 299; s. c. 3 M. & Sc. 763.

⁵ Browne v. Dunnery, Hob. 208.

when to be made.

could not without notice distrain for a half quarter's rent.⁶

If there be a rent reserved payable at a certain day, and the tenant be ready on the land to pay it, but the landlord be not there to receive it, still the rent continues to be due: and if the landlord make a subsequent demand at any time, and the rent be not paid, he may distrain.⁷

So if the rent in arrear be once duly tendered to the person entitled to it, he cannot afterwards distrain for it, without a previous demand, and a refusal on the part of the tenant.⁸

It may be observed that these rules with respect to a demand of rent apply equally to cases of rent-charge as to those of rent-service, although the rent-charge be in the hands of an assignee.⁹

A distress for rent cannot be made in the night- Distress, time,—that is, from sun-set till sun-rise,—because the to be mad tenant would have no notice or opportunity to make a tender of the amount due, which he might possibly do in order to prevent the distress.¹

The earliest period, therefore, at which a distress for rent may be made, is the day after that on which it falls due: for the distress can only be for rent in arrear; (which as we have already seen, the rent cannot be till after midnight of the day on which it becomes payable;²) and even after the rent is in arrear, the distrainer must still wait for sun-rise on the following day before he can exercise his remedy.

The latest period at which a distress for rent may be made is fixed, as we have just seen, by section

⁶ Mallam v. Arden, 10 Bing. 299; s. c. 3 M. & Sc. 763.

⁷ Cranley v. Kingswell, Hob. 207; Horne v. Lewin, L. Raym. 639, 641; Maund's case, 7 Co. Rep. 28.

⁸ Id.; Pim v. Greville, 6 Esp. 95. As to a distress after tender, see post, c. 5.

Maund's case, 7 Co. Rep.
 Besides the cases above cited, see also, as to a demand

of rent, Perryman v. Bowden, Het. 59; Fox v. Vaughan, Id. 86; Dethick v. Bradhorn, 2 Sid. 110, 117; Dennis v. Bosden, 1 And. 253; Wicks v. Dennis, 1 Leo. 190; Dyer, 348; Swynerton v. Mills, Br. & G. 178; Lumley on Rentcharges, 367, 8.

¹ Co. Lit. 142, a.; Aldenburgh v. Peaple, 6 C. & P. 212.

² Ante, p. 108.

42 of the statute 3 & 4 Will. 4, c, 27, to be within six years next after the rent shall have become due, or next after an acknowledgement of the same in writing shall have been given to the person entitled thereto or his agent, signed by the person by whom the same was payable, or his agent. And section 2 of the same statute enacts, that no person shall distrain for rent but within twenty years next after the time at which the right to distrain first accrued to the person distraining, or to some person through whom he claims.

Distress after xpiration of enancy.

It was a rule of the common law, that for rent reserved upon a lease, the lessor could not distrain after the determination of the term, for thereby the privity of estate was destroyed; 4 so that, for rent due on the last day of the term no distress could be taken, because the term was ended.⁵ But this rule, so productive of injury, was afterwards altered; and now by the statute 8 Anne, c. 14, ss. 6, 7, any person having rent in arrear upon any lease for lives, years, or at will, ended or determined, may after the determination of such lease, distrain for the arrears. as he might have done if the lease had not been ended: provided, that such distress be made within six calendar months after the determination of the lease, and during the continuance of the landlord's title or interest, and during the possession of the tenant, from whom such arrears became due. It has been decided that the possession of the tenant under this proviso is not limited to the personal possession of the tenant himself, but that the possession of his personal representative case of the tenant's death is equally within

³ The subsequent sections of the act point out the time when the right shall be deemed to have first accrued; see the act.

It has been decided that a distress for an annuity accruing by will must be resorted to within twenty years from the death of the testator. James v. Salter, 3

Bing. N. C. 544; s. c. 4 Scott, 168.

⁴ Pennant's case, 3 Co.Rep. 64; Bro. Dist. pl. 74.

⁵ Co. Lit. 47, b. If, however, the tenant held over, it seems to have been considered that the lease was so far continued as to warrant a distress for the rent. Anon. Keilw. 96. Sed quære.

tute.6 It has also been held that a landlord ermits his tenant to retain possession of part of after the tenancy has expired may within six 3 distrain on that part for any arrears remaine: for the operation of the statute is not concases of a tortious holding, or to a holding of ole.7 But where a tenant of a farm, having ed a few days after the expiration of his term, e entry of a new tenant, went away leaving a d some pigs, but giving no further intimation rpose to return, or to continue to hold any part premises, it was decided that there was no ing possession by the tenant to justify the d under the statute in distraining the cow and left for arrears of rent.8 The statute applies cases in which the tenancy has been deterby lapse of time, and perhaps by notice to quit, t to cases where it has been put an end to by nant's own wrongful disclaimer.9 Where a s corn remains in a barn on the demised prebeyond the period of six calendar months after termination of his term, but within the time I by the custom of the country for the outenant to get in and dispose of his crop, it may rained by the landlord for arrears remaining for this additional period is a kind of excresof the term or modified continuation of it: the is in fact a tacit agreement between the parat the contract between them shall continue certain time, and therefore until such time, it ontinue with all its original rights and pro-If instead of such a tacit agreement by the of the country, there be an actual express at to a like effect between the parties, the landright to distrain for arrears will, of course, be ne.2

ithwaite v. Cooksey, 1 l. 465. ttall v. Staunton, 5 B. 1; s. c. 6 D. & R.

plerson v. Peters, 7 A.

⁹ Doe dem. David v Williams, 7 C. & P. 322. ¹ Beavan v. Delahav.

¹ Beavan v. Delahay, 1 Hen. Bl. 8; Lewis v. Harris, Id. 7 n. (a.)

² Boraston v. Green, 16 East, 81.

It has been decided that a termor after the expiration of his term cannot distrain on his under-tenant, if the under-tenant, although continuing in possession, refuse to acknowledge him as landlord.³

The provision of the statute 8 Anne, c. 14, ss. 6, 7, gives the remedy after the expiration of the tenancy to the landlord himself only, but the late statute 3 & 4 Will. 4, c. 42, ss. 37, 8, has extended a like power of distress under like circumstances to his executors and administrators in the event of his death.⁴

It has been said that a distress may be made for rent accrued after the expiration of a notice to quit, but that it is a waiver of the notice.5 But the case cited is no warrant for supposing, that if a tenant merely hold on, the landlord can at a future period, without any thing more taking place, by the act of distraining itself retrospectively confirm the tenancy so as to justify the distress. It merely proves that if a distress be made under such circumstances, and be acquiesced in by the tenant, it may be treated, as against the landlord, as an absolute confirmation of the tenancy on his part; so as to prevent him, for example, from recovering in ejectment on a demise laid subsequently to the distress. And it is now distinctly decided, agreeably to principle, that a tenant holding over after a notice to quit given by the landlord does not thereby waive the notice, and is not liable to a distress for any sum claimed by the landlord to have accrued as a rent since its expiration, unless an agreement between the parties to hold on at the old rent can be shown.⁶ If there be any

landlord may either sue for double value under the statute 4 Geo. 2, c. 28, or bring an action for use and occupation. Parke, B., said that Bayley, B., had already decided the question by ruling that where a tenant holds over after notice to quit, the damages to which a landlord

³ Burne v. Richardson, 4 Taunt. 720.

⁴ See ante, p. 11, 64.

⁵ Gilb. Dist. by Impey, p. 50., citing Zouch v. Willingdale, 1 H. Bl. 311; see also Har. Woodf. Land. & T. p. 304. 3rd ed.

⁶ Jenner v. Whitehouse, 1 Mood. & Rob. 213. The

amounting to a renewal of the old tenancy, of e the distress would be valid; and as that might from an implied as well as from an express ment, a wrongful distress in the first instance, seed in by the tenant, might form the ground subsequent valid one,⁷ or a voluntary payment e rent by the tenant might have the same

e only other case to be considered, in reference In case of e time of making a distress, appears to be that fraudulent fraudulent removal of the goods from the pre-removal. out of which the rent issues, and on which they otherwise have been distrained. For in this here was no remedy for the landlord at common and though he is now enabled by statute to follow off the premises, yet the time within which he exercise his privilege is limited by the enact-

which confer it. In the first instance this was confined to five days by the statute 8 c. 14, s. 2; but it has been since extended by atute 11 Geo. 2, c. 19, s. 1, which enacts that tenant for life, years, at will, sufferance, or vise, of lands or tenements, upon the demise of any rents are reserved, shall fraudulently or stinely convey away or carry off his goods such demised premises to prevent a distress, ssor, or any person empowered by him, may, thirty days next after such conveying away or ng off, distrain such goods as if they had still ued on the premises; provided that before the e they have not been sold bona fide, and for a le consideration, to a person not privy to the

iled in an action for d occupation are for ual time of occupation nd not for the whole ar.

Willingdale, 1 311.

⁸ Doe d. Cheny v. Batten, Cowp. 243.

⁹ As to what cases are within the statute, and the decisions thereon, see the next sect. of this chapter.

SECTION II.

Distress for rent where to be made, and if fraudulent removal.

We have already seen, that, as the rent for a distress is made issues out of the land, and remedy was originally substituted for an entropossession of the land itself by the person entrope the rent, a distress has always been considered cessarily connected with the land.

Distress where to be made.

The general rule, therefore, is, that the must be made on the land out of which issues, and not elsewhere. For this reason pieces of land are let by two separate although both be contained in one deed, distress cannot be made for them; as that v to make the rent of one issue out of the other where it was stated, in a special verdict, the indenture the lessor had demised to his tenar tain wharf next the river Thames, described | ments, together with all ways, paths, p easements, profits, commodities, and appurt whatsoever, to the said wharf belonging; a by the indenture the exclusive use of the land river Thames, opposite to, and in front of the between high and low-water mark, as wel covered with water as where dry, for the acco tion of the tenants of the wharf, was den appurtenant to the wharf; but that the la between high and low-water mark was not d it was held, that the lessor could not distrain in arrear barges the property of his tenant the space between high and low-water mark. tached to the wharf by ropes; for it was notwithstanding the contradictory terms of the verdict, that the right of leaving the barges

¹ This ancient rule of the common law was enforced by the stat. Marl. 52 Hen. 3, c. 15.

² Rogers v. Birkmi 1040; s.c. Rep. temp 245.

an easement, and that none of the rent resued therefrom.³

listress may be made upon any part of the the entire rent issues out of the whole and rt.4 So that if there be a house upon the stress may be made in the house, if the outer open: and where a single rent issues out of the occupation of several tenants, a distress hade for the whole amount upon the land of of them.5 In like manner it has been held. statute 8 Anne. c. 14, that where a tenant ossession of part of a farm after the tenancy ed the landlord may distrain for all arrears part, within the six months allowed by the the expiration of the tenancy.⁶ In the case t-charge—to which these rules are equally , -as the distress follows the nature of the a rent be granted out of one manor, with a ing a power of distress in another, the disof course be made upon the latter.7 ess is expressly forbidden to be taken on the or in the common street, which are not art of the land out of which the rent issues. so privileged for the convenience of passenthe encouragement of commerce.8 hough the land itself out of which the rent the only proper place for the distress to be , if the lord come to distrain cattle which

the only proper place for the distress to be, if the lord come to distrain cattle which pon the land, and the tenant or any other ves the cattle off the land, the landlord may w and distrain them even on the highway, save no view of the cattle whilst on the land, the tenant drive them off purposely to pre-

Buszard, 2 Man. 37; s. c. 6 Bing, re & P. 480; 3 Y. 8 B. & C. 141, . c. 4 Bing. 137; 339; 2 Car. & P.

ig. Dist. A. 3. Abr. 671.

<sup>Nuttall v. Staunton, 4 B.
C. 51; s. c. 6 Dowl. & R.
155; Beavan v. Delahay, 1 H.
Bl. 8; Lewis v. Harris, id.
7, n. See ante, p. 120, 1.
7 Bro. Abr. Charge, pl. 17.
See ante, p. 29.
8 Stat. Marlb. c. 15; Co.
Lit. 160, b.; Gilb. Dist. 51.</sup>

vent a distress; or if the cattle themselves, after the view, go out of the fee; or if the tenant, or any other person, after the view, remove them for any other purpose than that of preventing a distress; in these cases the lord cannot distrain them.⁹

By the statute 11 Geo, 2, c. 19, s. 8, landlords are enabled to take as a distress for rent any cattle or stock belonging to their tenants, depasturing upon any common appendant or appurtenant, or in any way belonging to the premises demised. This provision does not extend to a distress for a rent-charge.

It must be observed, that the above restriction as to the place of a distress for rent does not apply to the king, who is entitled by his prerogative to distrain not only on the land out of which the rent issues, but also on all the lands of his tenant, and in some cases even on those in the possession of an under-tenant: he is also entitled to take a distress in the highway. And in some cases the grantees of the crown have the same privileges as the king himself.²

In case of fraudulent removal.

We have just seen that where goods are fraudulently or clandestinely removed from off the premises in order to prevent a distress, (in which case they were not distrainable at common law,) a power to distrain them was first given to the landlord by the statute 8 Anne, c. 14, and was afterwards extended in point of time by the statute 11 Geo. 2, c. 19. This latter statute provides that if any tenant for life, vears, at will, sufferance or otherwise, of lands or tenements, upon the demise whereof any rents are reserved, shall fraudulently or clandestinely convey away or carry off his goods from such demised premises to prevent a distress, the lessor, or any person empowered by him, may, within thirty days next after such conveying away or carrying off, distrain such goods wherever found, for the rent arrear, and sell or dispose of the same; provided that before the seizure they have not been sold bona fide, and for a valuable

⁹ Co. Lit. 161, a.; 2 Inst. 132; Clement v. Milner, 3 Esp. 95.

¹ 2 Inst. 131. This ancient

prerogative of the crown was specially excepted from the operation of the stat. Marib-² See ante, p. 76, 7.

deration, to a person not privy to the fraud. And : 7th section of the same statute it is enacted, that : any goods fraudulently or clandestinely carried by any tenant or lessee, or their servant, agent, her person aiding therein, shall be put in any or other place, locked up or otherwise secured, to prevent such goods from being distrained for the landlord or lessor, or his bailiff, may in the me, with the assistance of the constable or other officer of the hundred, parish or place, where me shall be suspected to be concealed, and in case welling house, oath being also first made before justice of the peace, of a reasonable ground to t that such goods are therein, break open and into such house or place, and take and seize such for the arrears of rent, as he or they might have y virtue of that or any other former act, if such had been put in any open field or place.

vill be convenient to consider in this place what are within the statute.

is, it has been ruled, that to bring a case within atute, the removal must have taken place after nt became due. It has been said that the remust be secret, not made in the open day, se such removal could not be said to be clandesvithin the meaning of the statute; but in a case where a tenant openly and in the face of nd with notice to his landlord, removed his, without leaving sufficient on the premises to the rent then due, and the landlord followed listrained the goods, it was held that although moval might not be clandestine, yet if it was

ttson v. Main, 3 Esp.
rthfield v. Nightingale,
1832. MSS. Woodf.
:T. by Har. 327, 3rd ed.
v. Vaughan, 1 Bing.
'67; s. c. 1 Scott, 670.
case indeed; at Nisi
Lord Ellenborough
d whether, if the reof goods take place in
ight to prevent the

landlord from distraining them for rent to become due the following morning, such removal would not be within the statute. *Purneaux* v. *Fotherby*, 4 Camp. 136. But it clearly is not. 1 Bing. N. C. 770.

⁴ Watson v. Main, 3 Esp. 16; Gilb. Dist. by Impey, 54,

fraudulent, (which was a question for the jury,) the landlord was justified under the statute.5 Indeed the fact of a removal being clandestine appears to be of importance chiefly as evidencing fraud; and the statute may now be said to apply to all cases where a landlord by the conduct of his tenant in fraudulently removing goods from premises for which rent is due, is turned over to his barren right of bringing an action for its recovery. As to the question of fraud, the mere removal of goods is not of itself fraudulent as against the landlord; to justify him in following them it must be shown that the goods were removed with a view to elude the distress, and also that sufficient was not left upon the premises.6 And it seems to be a question for the jury whether the removal is fraudulent within the statute, although it be admitted at the trial that the removal was to avoid a distress.7

The statute applies to the goods of a tenant only, and not to those of a stranger, or lodger.8

In a case where a bond fide creditor of a tenant, knowing the tenant to be in distressed circumstances, and apprehending that he would be distrained upon by his landlord, went to the premises for which the rent was in arrear, and seized, and with the knowledge and consent of the tenant drove away a number of cattle, not exceeding in value the amount of his demand, it was held that this was not a fraudulent removal within the statute.⁹

⁵ Opperman v. Smith, 4 D. & R. 33; and see Bach v. Meats, 5 M. & Selw. 200.

⁶ Parry v. Duncan, 7 Bing. 243; s. c. 5 M. & P. 19; Mood. & M. 533.

⁷ John v. Jenkins, 1 C. & Mees. 227.

⁸ Thornton v. Adams, 5 M. & Selw. 38; Postman v. Harrell, 6 C. & P. 225. So that a plea justifying the following goods off the prenises, and distraining them for rent in arrear, must show that they

were the tenant's goods. A clandestine removal must always be pleaded specially. Furneaux v. Fotherby, 4 Camp. 136; Vaughas v. Davis, 1 Esp. 257.

⁹ Bach v. Meats, 5 M. & Selw. 200. "If it had appeared that the tenant had urged the creditor to seek this remedy, the case might have assumed the character of fraud: but where the creditor is the first mover, and the tenant does no more than

How to be made.

If the assignees of a bankrupt tenant take possession of effects of the bankrupt and continue them on the premises under such circumstances as themselves to become tenants to the landlord, and afterwards, rent being in arrear, remove them to avoid a distress, the effects may be followed under the provisions of this statute.

On the seventh section it has been ruled, that the terms of the enactment must be strictly complied with,² but that it is not necessary for a party seizing goods fraudulently removed first to call to his assistance an ordinary peace officer; it is sufficient if he be assisted by a person appointed a special constable for the occasion.³

It may be observed in conclusion that where a tenancy has ceased by the conveyance of the land-lord's reversion he is of course no longer entitled to follow goods removed to avoid a distress.⁴

The remedy provided in case of fraudulent removal will be considered hereafter.

SECTION III.

Distress for rent how to be made; and herein of the course to be pursued by the landlord where the goods have been previously taken in execution.

A distress for rent may be made either by the person to whom it is due, or by any other person 1 acting as his bailiff, or agent authorized by him to make the distress.

accede to an arrangement for discharging himself and satisfying the creditor, what fraud is to be imputed to him?" Per Lord Ellensorough, C. J., Id. 203.

¹ Welsh v. Meyers, 4 Camp. 168.

1 The stat. of Westm. 2nd 13 Edw. 1, c. 37, which enacts that no distress shall be taken except by bailiffs "sworn and known" does not apply to a distress taken for rent in arrear. Begbil v. Hayne, 2 Bing. N. C. 124; s. c. 2 Scott, 193; Child v. Chamberlain, 6 C. & P. 213. It seems that an infant cannot be appointed a bailiff; Curkson v. Winter, 2 M. & Ryl. 313.

²Rich v. Woolley, 7 Bing. 651. ³ Cartwright v. Smith, 1 M. **3.66** 284.

⁴ Ashmore v. Hardy, 7 C. & ?. 501.

Warrant of Distress.

When a distress is made by a bailiff he properly have an authority in writing from l ployer, which is technically called "a warr distress" (a): and in the case of a joint distr by coparceners, the warrant may either be sig all the parties entitled,2 or be given by one authorize a distress for the rent due to all.3 warrant of distress, though always proper a visable, is not necessary; for a man may without any express previous authority; an afterwards obtain the assent of the person in right he distrained, such assent will have 1 back to the time of taking the distress, and wi effectual as a command could have been⁴,—ac to the maxim, omnis ratihabitio retrotrahitur, dato priori æquiparatur.5 Thus where in r against a broker it was proved that the landle ployed the attorney to defend him, that was be sufficient evidence of the broker's author distrain, in the absence of any written warran

It is said, that although a landlord is prin personally liable for the act of his bailiff in irre conducting a distress, yet, if he disclaim and

(a) It may be in the following form:—

To E. F. my bailiff.

I hereby authorize and require you to distrain the g chattels in the dwelling-house (or, in and upon the far and premises) of C. D. situate at - in the county for the sum of --- being --- years' rent due to me same at --- last; and to proceed thereon for the re the same as the law directs. Dated this -

⁽Signed) A

² Buller's case, 1 Leon. 50. ³ Leigh v. Shepherd, 2 B. & B. 465; s. c. 5 Moore, 297; Robinson v. Hoffman, 4 Bing. 562; s. c. 1 M. & P. 474; 3 C. & P. 234; see ante, p. 44. ⁴ Bro. Abr. tit. Traverse, 3; Lamb v. Mills, 4 Mod.

^{378;} Trevillian v. Mod. 112; Potter 1 Saund. 347, n. (4. ⁵ Maclean v. Dunn.

⁶ Duncan v Meu C. & P. 172.

diate the act, when he knows of the circumstances, he is not bound by it.

A landlord gave an authority to a broker or his gent to distrain on the goods of his tenant, and gave him also an indemnity against all costs and charges that he or his agent might be at "on that account." The broker entered and made the distress; and afterwards his men, being told by the tenant's son that a certain cask found upon the premises contained spent liquor of no value, took the cask to pieces, as it could not be otherwise removed from the place where it was distrained, and let the liquor run off. It proved in fact to be valuable cochineal dye belonging to a third party, who recovered damages for the waste of it in an action against the broker. It was held that the broker could not recover the amount of those damages from the landlord in an action on the indemnity, as the indemnity could not be intended to protect the broker from the acts of his own men, but only to apply to cases where the distress was illegal from the lendlord having no power to put in such distress.8

The most proper manner of making a distress is for the person distraining, whether the landlord himself, or his bailiff, to go into the house, or upon any part of the premises out of which the rent issues, and take hold of some piece of furniture or other personal chattel, distraining it in the name of all the other goods there, (b) or of such part as it is intended to distrain; and that will be a good seizure of all. But no particular form or precise terms are absolutely necessary to make a distress; any distinct expression of intention on the part of the person distraining

⁽b) He may say.—"I take this table" (or whatever else it may be) in the name of all the other goods on these premises, as a distress for the sum of —— rent, due to me" (or "to A. B." as the case may be) "at —— last." A bailiff may go on to may, "By virtue of an authority given to me by A. B. for that purpose."

⁷ Hurry v. Rickman, 1 M. & P. 84.

Rob. 126. Littledale, J. 9 Dod v. Monger, 6 Mod. 126. Draper v. Thompson, 4 C. 215.

being sufficient. Thus where a landlord, to whom rent was in arrear, on hearing his tenant and a stranger disputing about removing a lathe, entered the house, and laving his hands on the machine, said "I will not suffer this, or any of the things to go of the premises till my rent is paid," the distress was held to be sufficiently made. 1 Where a landlord's agent went upon the tenant's premises, walked round them without touching any thing, and gave a written notice that he had distrained and left there certain specified goods for an arrear of rent, and that unless the rent was paid, or the goods replevied within five days, they would be appraised and sold according to law, and then went away without leaving any one in possession; it was held as between landlord and tenant that this was a sufficient seizure to give the tenant a right of action for an excessive distress.2

Where a distress is made by a bailiff, he should show the cause of making it if required to do so, but if not requested he may distrain generally.⁸

In order to make a distress the outer door of a house can in no case be broken open,—except in the case of a distress of goods fraudulently removed;—but if the person distraining can by any means get into the house without committing a trespass, he may do so, and may then lawfully distrain. Thus in a singular case where a landlord occupied an upper apartment over a mill demised to his tenant, from which his apartment was separated only by a boarded floor without any plastered ceiling to the mill below, it was held that he might take up the floor of his own apartment, and legally enter through the aperture to distrain for his rent.⁵ When the person distraining

¹ Wood v. Nunn, 5 Bing. 10: 2 M. & P. 27.

² Swann v. Falmouth (Earl.) 8 B. & C. 456; s. c. 2 M. & Ryl. 534. But in this case it was said that it "might have been different, had the question arisen between the laudlord and an execution-

creditor, or a purchaser for valuable consideration without notice." Per Littledale, 1.; see also Hutchins v. Scotl, 2 M & W. 809.

Buller's case, 1 Leon. 50.
 See ante, p. 127.

⁵ Gould v. Bradstock, 4 Taunt. 562.

is once within the house he may justify breaking open an inner door, or lock, to find any goods which are distrainable.6 And after the entry is once legally effected, and the distress made, if it be not deserted, but the distrainer be compelled to quit the house by the tenant's violence, he may return with competent force, and after demand of admittance break open even the outer doors; for this would be only a recontinuance of the first taking, and consequently would be lawful. But in case where a broker's man after taking possession of property under a distress, and remaining in possession two days, left the house in a state of excitement bordering on insanity, and the landlord, thinking that the man's leaving had been procured by the drugging of his liquor by the parties in the house, (but which was not proved,) six days afterwards broke into the house and took away the goods, without any previous demand of admission; it was held, that he had no right to enter again after so long a delay, and that the owner of the goods might maintain trover for them.8

In making a distress for rent circumstances may occur which may require the presence of a police officer. But to justify the landlord in calling him in it must be shown that his presence was rendered necessary, either from threats of resistance or the apprehension of violence.⁹

apprenension of violence.

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In making the seizure care must be taken not to distrain any thing which may be privileged from distress, as well as not to make an unreasonable or excessive distress, the quantity of goods taken being fairly proportionate to the amount of rent in arrear.

Therefore as the distress may be made on all, or Inventory only on a part of the goods upon the premises, it is the goods proper that the tenant should be informed what trained. goods the landlord intends to comprise within the

⁶ Brown v. Daun, Bull. P. 416.

N. P. 81.

Per Wilmot, J. See Esp.

Skidmore v. Booth, 6 C. & P. 777.

P. 382.

Russell v. Rider, 6 C. & Ante, c. 3, p. 89.

Ante, c. 3, p. 89.
Ante, p. 9; post, c. 7.

distress; in order that he may know what he will obliged to replevy. And for this purpose, as soon the seizure has been made, the party distraini should make an inventory of so many of the goods are judged sufficient to cover the rent distrained f and the charges of the distress (c).

If it be intended to proceed to a sale of the distration a notice also, pursuant to statute 2 W. & M. c. s. 2, must be given to the tenant of the fact a cause of the distress having been made, and of time when the goods will be appraised and sold, uless previously replevied, or the rent and charge

(c) The Inventory may be in the following form:-

"An Inventory of the several goods and chattels distrained me A. B.," (or "E. F. as bailiff to A. B.) on the —— day of—1839 in the dwelling-house (or outhouses, barn, kinds, &c." as case may be) "and premises of C. D. situate at —— in parish of —— in the county of ——" (and if the distress made as bailiff add "by the authority and on the behalf of said A. B.) for the sum of £ —— being —— years" (or as case may be) "rent due to me" (or "to the said A. B.) for said house" (or as the case may be) "and premises at —— and still in arrear and unpaid.

In the Dwelling-House.

1. In the Kitchen.

One table, six chairs, one clock, two tea-kettles, &c.

2. In the Dining-Room.

One set of dining tables, two mahogany commodes, &c.

3. In the Drawing-Room.

One rosewood loo-table, one cabinet piano-forte, &c.

In the Out-Houses.

1. In the Barn.

Twenty bushels of wheat, &c.

2. In the Stable, &c. &c. &c."

And so describing the things according to where they

In the case of a distress for arrears of a rent-charge beginning of the above form must of course be altered to n the circumstances.

How to be made.

satisfied.³ It is not absolutely necessary that this notice should be in writing where it can be personally given,⁴ but it is the best and most usual course to write it at the top or bottom of the inventory (d); and

(d) In case of rent due upon a demise it may be in the following form:—

"Mr. C. D.

TAKE NOTICE, that I" (and if the distress is made as bailiff add, "as bailiff to A. B. your landlord) have this day distrained on the premises above mentioned, the several goods and chattels specified in the above inventory for the sum of being - years' rent due to me" (or "to the said A. B.) at - last for the said premises" (if the goods are secured on the premises under the authority of the statute 11 Geo. 2, c. 19, s. 10,-vide post-add "and have secured the said goods and chattels in the stable, &c." as the case may be, "on the said premises," 5-and if growing crops are distrained under sects. 9 & 10 of the same statute, the notice must of course suit the particular circumstances, see infra,) "and that unless you pay the said rent, with the charges of distraining for the same, or replevy the said goods and chattels, within five days from the date hereof, the said goods and chattels will be appraised and sold according to law. Given under my hand, the — day of ——— 1840. A. B." or " E. F."

To Mr. C. D., and all whom it may concern."

Where the distress is made for the arrears of a rent charge, the following form of notice may be adapted to the circumstances:—

" Mr. C. D.

TAKE NOTICE that," (if the distress is made as bailiff add, "by the order, and on the behalf of A. B.) I have this day taken and distrained in and upon the farm, lands," (as the case may be) "and premises, called — at — in the parish of — in the county of — now in your possession all the corn, grain, and effects" (as the case may be) "mentioned in the inventory above written, for the sum of — being — years' annuity or rent charge of — per annum due to me" (or "to the said A. B.) at — last, and charged on and issuing and payable out of certain manors, farms, lands, and premises called — in the parish of — in the county of — aforesaid, of which the farm and lands first above mentioned are part and parcel, and that unless the said arrears of the said annuity or

² 2 W. & M. c. 5, s. 2. Salk. 247; 1 Ld. Raym. 53. ⁴ Walker v. Rumbold, 12 Mod. 76; s. c. 4 Mod. 390; 279.

in every case it must be either given personally to the tenant or owner of the goods, or left at the chief mansion house or other most notorious part of the premises charged with the rent. A true copy of the

rent-charge, together with the expenses of this distress, are paid and satisfied, the said corn, grain, and effects will be disposed of according to law. Dated, &c.

A. B." or " E. F."

To Mr. C. D., and all whom it may concern."

Where growing crops are distrained under the authority of the statute 11 Geo. 2, c. 19, s. 8, the notice may be in these terms:—

" Mr. C. D.

TAKE NOTICE that I," (and if the distress is made as bailif add, "as bailiff to A. B. your landlord) have this day distrained on the lands and premises above mentioned the several growing crops specified in the above Inventory for the —— sum of —— being —— years' rent due to me" (or "to the said A. B.) at —— last for the said land and premises, and unless you previously pay the said rent," with the charges of distraining for the same, or replevy the said growing crops, I shall proceed to cut, gather, make, cure, carry, and lay up the crops when ripe, in the barn or other proper place on the said premises, and in convenient time shall have the same appraised, and shall sell and dispose of the same towards satisfaction of the said rent, and of the charges of such distress appraisement and sale, according to the form of the statute in such case made and provided. Dated, &c.

A. B," or "E. F."
To Mr. C. D., and all whom it may concern."

If neither the rent be paid, nor the crops replevied, in due time, another notice must be given to the tenant or left at his lest place of abo'e within a week after the crops are cut, carried, and laid up, as required by the statute, stating the place where they are lodged.

The following memorandum may be made of having delivered a true copy of the Inventory and notice:—

"A true copy of the above Inventory and notice was on this
—— day of —— 1840, delivered to the above mentioned C. D.
in the presence of me
W. S."

⁷ 2 Will. & M. sess. 1 c. 5. s. 2.

8 Where the grant of the rent-charge does not give an express power of sale of the distress, it is said to have been doubted whether or not it can be legally sold. Lumley on Rent-charges, p. 383; but see infra.

⁹ By the words of the statute if the tenant pay or tender the arrears of rent and

⁶ Walter v. Rumball, 1 L. Raym. 53; s. c. 12 Mod. 76; 1 Salk. 247.

ventory should be served, or left, at the same time: ad it is advisable always to have a witness present, s well when the distress is made, as when the notice nd inventory are served, to attest, if necessary, the egularity of the proceedings. The statute expressly irects that the notice shall specify the cause of the aking, and this must therefore be done correctly: or though the old rule, that a man may distrain for ne cause and justify for another, may still obtain vhere it is applicable, and in all cases as far as the aking is concerned; vet in order to justify a disrainer in proceeding to a sale under the statute, the giving a notice of the taking, and of the cause of it, appears to be a condition precedent. The notice need not state when the rent distrained for became due.2

Before proceeding to inquire how the distress when The course made is to be treated, it will be proper to consider in be pursued this place the course to be pursued by the landlord the landlord when the goods on the premises are already in the when the possession of the law under an execution.

In this case, as we have already seen, it is not possession of competent for him to distrain, because the goods are the law un privileged, being in the custody of the law. But he an executio must give notice to the sheriff in possession of his claim for rent under the statute 8 Anne, c. 14, s. 1, which enacts that no goods taken on any lands leased for life, years, at will, or otherwise, shall be taken in execution, unless the party at whose suit execution is sued out, before the removal of the goods, pay to the landlord the arrears of rent, if not exceeding one year's rent, and if more, then the amount of one year's rent, due at the time of the execution. (e)

(e) The notice may be in the following form:--To S. F. Esquire, Sheriff of the county of ----.

TAKE NOTICE that there is now due to me from C. D. the person to whom certain goods belong, of which you are now in

osts of the distress, at any ime before the corn, &c. be nt, the distress shall cease, nd the corn, &c. be delivered ip. 11 Geo. 2, c. 19, s. 9.

³ See ante, p. 84, 5. n. (3.)

¹ Crowther v. Ramsbottom,

⁷ T. R. 654; Etherton v. Popplewell, 1 East, 142; but see Buller's case, 1 Leon. 50. ² Moss v. Gallimore, 1 Doug. 279.

What cases tatute 8 Anne, c. 14.

The eighth section of the statute provides that the re within the crown may levy, recover, or seize any debts, fines penalties, or forfeitures, as if the act had not been made.

> But in the cases of execution at the suit of a sub ject, the statute extends to those levied on any de scription of judgment, whether for the plaintiff o defendant in the action; and also to the seizure goods upon process of outlawry, which is considere as an execution at the suit of a subject, and not (the crown.⁵ It seems that a sequestration is likewis an execution within the statute, and that therefor in such case the landlord will be entitled to recover year's rent in preference to other creditors. But commission of bankruptcy has been decided not tob within the act; 7 neither is the possession of the a signees of an insolvent.8 In these latter cases, as w have already seen, the landlord is not precluded from distraining;9 so that there exists here no hardshi which the statute was called upon to relieve. The statute applies only to cases in which the judgmen

> possession by virtue of a writ of fieri facias, &c. returnable, &c (state the writ and return) "the sum of - for one year's (or other less period, as the case may be,) "rent issuing o of the premises where the same were seized. Dated, &c. A. B. landlord of the premises."

> In the case of a receiver the following form, which w used in the case of Colyer v. Speer, 2 B. & B. 68, may adopted:--

> "To the sheriff of the county of -, and to Mr. his officer, and to all others whom it may concern.

> > P. F. v. C. D.

I do hereby give you notice that there is due to A. B. and ! mortgagees of his estates in the parish of --- in the county - from C. D. the defendant the sum of - for - yea rent due at --- last past, which you are to pay to me receiver of the rents of the same estates. Dated, &c.

⁷ Lee v. Lopes, 15 Ea 230; Gethin v. Willes, 4 Henchett v. Kimpson, 2 Wils. 140. Dowl. 189. 5 Groves D' Acastro, 8 Taylor v. Lanyon, 6 Bir Bunb. 194. 536; s. c. 4 M. & P. 316. ⁶ Dixon v. Smith, 1 Swanst. 9 See ante, p. 87, 8. 457.

or claims adversely to the landlord, and not to in which the execution is issued at the instance landlord himself.¹

statute extends only to those cases where is an existing tenancy at the time of the execund a present right of distress in the landlord; no others is he damnified by the privilege from s conferred on the goods by the seizure.

provision has been decided to extend only to mediate landlord of the premises, and not to ound-landlord distraining the goods of an unsee: 3 but it applies to the case of lessee and tenant of apartments of a house as well as to se of landlord and lessee. 4 An executor or istrator of a deceased landlord is equally enned the statute as the landlord himself: 5 but administrator to whom administration was dafter the goods were sold under an exe-

rent to which the landlord is entitled is that r a year immediately preceding the execution; erefore if the tenant hold under a lease at one ind afterwards under a second demise at r, the landlord cannot demand the amount ar's rent unpaid upon the expired lease; and only claim rent actually in arrear at the time execution, and not such as may accrue due he taking and during the continuance of the in possession. He is entitled to a full

lor v. Lanyon, 6 Bing. c. 4 M. & P. 316. gson v. Gascoigne, 5 dd. 88; Rotherey v. i Camp. 24; Saunders rave, 6 R. & C. 524;). & R. 529; 2 C. &

net's case, 2 Str. 787. rgood v. Richardson, 428; s. c. 5 M. & P. C. & P. 481. chett v. Kimpson, 2 0; Palgrave v. Wind-

ham, 1 Str. 212; Twells v. Colville, 2 Wils. 377.

⁶ Waring v. Dewberry, 1 Stra. 97.

⁷ Cook v. Cook, Andr. 219.
⁸ Hoskins v. Knight, 1 M.
& Selw. 245. Gwillim v. Barker, 1 Price, 274. If the sheriff remain beyond a reasonable time on the premises so as to injure the rights of the landlord, the latter may have his remedy by means of an action on the case. 1 M.

year's rent, although he has been used to remit some portion of it to the tenant.⁹ If there be two executions on the tenant's goods the landlord is not entitled to have a year's rent out of each, but must demand it out of one only.¹ The statute extends to a forehand rent reserved payable in advance.²

It is necessary that notice should be given to the sheriff of the landlord's claim for rent; for it is not the sheriff's duty to find out what is due, and pay it.³ Yet although he have no specific notice given him by the landlord of rent being in arrear, if he be aware of the fact, and proceed to sell under the execution, without retaining a year's rent, he will be liable.⁴ Before the sheriff pays the rent he must have some evidence that it is due; for if it turn out that none is due, he must answer for it; but slight evidence of the fact will be sufficient.⁵

After notice has been given to the sheriff it is his duty to levy for the rent in the first instance, and then for the execution; and he must retain a sufficient sum to satisfy such rent, before he removes any of the goods from the premises. He must retain the year's rent out of the proceeds of the goods, provided he have notice of the landlord's claim at any time whilst the goods remain in his hands; and in one case the court ordered the amount to be paid to the landlord even where the notice was given after the goods were removed off the premises. If the sheriff find that the goods on the premises are not sufficient to satisfy a year's rent of which he has received notice, his proper course is to withdraw.

[&]amp; Selw. 245; Rex v. Hill, 6 Price. 19.

Williams v. Lewsey, 8
 Bing. 28; s. c. 1 Moore, & S.
 92.

¹ Dod v. Saxby, Str. 1024. ² Harrison v. Barry, 7 Price, 690.

³ Smith v. Russell, 4 Taunt. 400; Waring v. Dewberry, 1

Stra. 97; Palgrave v. Wind-

⁴ Andrews v. Dixon, 3 B.& Ald. 645.

⁵ Keightly v. Birch, ³ Camp. 521, n.

⁶ Arnitt v. Garnett, 3 B. & Ald. 440.

⁷ Foster v. Hilton, 1 Dowl. 35.

sheriff, so as to transfer the property in them, e defendant pays the debt and costs, the landnot entitled to receive his year's rent at the of the sheriff, though he may have given notice course: but a bill of sale taken on a fi. fu. is cient removal of the goods within the sta-

remedy which a landlord has in cases where eriff proceeds to levy the execution and remove cods without paying the rent after notice, action on the case, or more summarily a mother court that he may have restitution to mount of the goods the sheriff has sold, if amount to less than one year's rent, or if amount to more, then to have so much as will a year's rent.

SECTION IV.

ss for Rent how to be treated; and herein of the Pound.

distress being made, it is necessary to conin the next place what the distrainer is to th it, that is to say, how it is to be kept reated.

vas formerly by the common law the duty of strainer 1 to pursue a course, which in most ins 2 is still open to him if he choose to adopt it, y, immediately to remove the goods from the

thery v. Wood, 3 Camp. rest v. Hedges, Barnes,

e further as to 8 Anne, Har. Woodf. L. & 44, et seq. 3rd ed. herwise he became, as y other case of irregupt to the passing of the 11 Geo. 2, c. 19, s. respasser ab initio, see .7. ² Corn loose or in the straw, &c. cannot under any circumstances be removed, for the same statute, 2 Will. & M. c. 5, s. 3, which made them distrainable, ordered them to be impounded where found.

And growing corn, &c. distrained under the statute. 11 Geo. 2, c. 19, must after it is cut be placed in a proper

premises for the purpose of impounding them elsewhere.

Impounding the distress is placing it in the custody of the law by depositing it in a fitting pound or inclosure; where it was formerly to remain for an indefinite period till redeemed by payment of the rent and expenses, or till replevied; and where it has now to be kept for the space of five days, at the expiration of which it may be sold under the statute 2 Will. & M. c. 5, unless previously replevied, or satisfaction made.

The pound.

The pound s is either a pound overt or a pound covert. The former, an open pound, as any place open overhead,—whether the common pound of the lordship, township, or village, or the private pin-fold or close of the distrainer,—in which the distress may be lawfully put without making the owner a trespasser, and to which he may have access, for the purpose (in the case of cattle) of feeding and tending them. A pound covert is one covered at least overhead, and sometimes a complete inclosure, as a house, barn or stable, where the owner of the distress cannot enter.⁴

In the event of the removal of the distress, the rules of the common law respecting the impounding must still be observed; and the distinctions between the pound overt and covert, and the common or public and the private pound, are very important.

Thus, if cattle be impounded in a common public open pound, the owner of them is bound to take notice of it; but if they are put into a private pound, then notice of the place must be given to him by the distrainer.⁵

If the things distrained be household goods, or any thing else capable of being damaged by the weather, or of being easily carried away, it is the

place on the premises, and cannot be removed except in default of there being such proper place. See *infra*.

³ See ante, p. 2. n. (6.)

⁴Co. Lit. 47. b; Kitch.

^{144;} Terms de Ley; Doct. & Stud. 1. 2, c. 27; 5 H. 7, 9, b.; Com. Dig. tit. Distress, D.; 3 Bl. Com. 12.

⁵ Co. Lit. 47. b.; 3 Bl. Com. 13.

duty of the distrainer to impound them in a pound covert, as a house, or other inclosed place, in which they may be kept in safety, and free from damage; for if he put them into a pound overt, he must be answerable for them.6 But cattle and all living chattels should regularly be put into a pound overt. The reason of this last rule of the common law was. that the owner was bound to sustain them at his peril, and consequently they were to be put into such open place as he could have access to for that purpose; whereas if they were placed in a private pound, or a pound covert, they were to be sustained by the distrainer, for which he was entitled to no satisfaction, and if they died for want of proper food and care he was considered answerable for them. This, however, has been altered by a recent statute; and now by 5 & 6 Will. 4, c. 59, s. 5, the distrainer is in all cases where cattle are put into a pound, overt as well as covert, bound, under pain of forfeiting five shillings per day, to supply them with necessary food and nourishment; and he may then recover before a justice of the peace not exceeding double the value of such food from the owner.8 If cattle are stolen from a pound overt the distrainer is not answerable for them, because such a pound is the proper one for the impounding of cattle.9 Yet this supposes the pound to be proper and sufficient; for it is so far the pound of the distrainer for the time being, and he is so far responsible for its being a suitable and safe one, that if any cattle be stolen therefrom, or any loss happen, through its being in an insufficient state, he will be answerable for such result. Thus it is said that if a distrainer put a horse into a pound with

⁶ Co. Lit. 47. b.

⁷ Ibid.

⁸ By section 5th of the same statute where animals have been impounded without sufficient food more than twenty-four hours, any person may enter the pound and sup-

ply them with food without being liable to an action of trespass or other proceeding.

⁹ Vaspor v. Edwards, 12 Mod. 662; s. c. 1 Salk. 248; Lord Raym. 720.

¹ Id.

spikes, by which the horse wounds himself be liable: 2 and he cannot tie or bind a bes pound, though it be to prevent its escape; act of his, which tends in any way to th of the thing distrained, is done at his own p in a late case it was decided, upon this sa ciple of a distrainer being bound to see that to which he takes a distress is in a fit state t it, that where a pound was wet and muddy trainer was liable for damage thereby cause distress, a flock of sheep, impounded ther where cattle die in the pound, or are others to the distrainer without any default on his is not only not liable, but entitled to make distress for his rent.4

At common law a man might have impou distress in what county he pleased; but t made a means of oppression, and was fou inconvenient to the owner, who was there loss where to find his beasts either to replevy them.⁵ This mischief was therefo vided against in the first place by the st Marlebridge. 6 which forbade the distress carried out of the county where it was me was at length effectually remedied by the 2 Ph. & M. c. 12. By sect. 1, of this latte: it is enacted, that no distress of cattle shall b out of the hundred, rape, wapentake, or lathe such distress shall be taken, except to a pour within the same shire, not above three miles from the place where such distress is take that no other cattle, or other goods distrained cause at one time, shall be impounded in places, whereby the owner of such distress constrained to sue several replevies for the of such distress; and that every person or contrary to the act, shall forfeit to the party;

³ Wilder v. Speer, 3 N. & P.

⁴ Vaspor v. Edwards, 12

Mod. 662; s. c. 1 Salk. 248;

Lord Raym. 720.

⁵ Gilb. Dist. 4th e pey, 62.

⁶ Stat. Marlb. c. 4.

or every such offence, a hundred shillings and treble amages. And by section 2, of the same act, no erson shall take more than fourpence for impounding nd keeping in pound one whole distress, and where sas has been used, shall take less, under a penalty to he party grieved of five pounds, together with the xcess of the sum taken. As this statute expressly mjoins the distress not to be driven out of the county, it cannot now be carried into another county. although it be to the nearest pound and within three miles from the place of the distress.8 But where one distress was made for an entire rent, issuing out of two adjoining parcels of land in different hundreds and different counties, it was held that the cattle distrained in both counties might be chased into one of them, and might properly be impounded there.9 If however the entire rent had issued out of two parcels of land, situate in different counties not adjoining to each other, (as Middlesex and Hampshire,) the distress could not have been driven from one to the And where a distress was made in the hundred of Offlay in Staffordshire, and was afterwards impounded within the city of Litchfield; (which was formerly within the hundred, but was afterwards by letters patent made a county of itself;) it seems to have been considered as irregular within this statute.² It has been decided that the offence created by this statute for impounding a distress in a wrong place is but a single offence, and shall be satisfied with one forfeiture, though three or four persons are concerned in doing the act; for the offence cannot be severed so as to make each offender separately liable to the penalty; the meaning of the statute being, that the penalty shall be referred to the offence, not to the

⁷ This sect. 2, does not extend to cases where the distress is impounded on the premises under the statute 11 Geo. 2, c. 19, s. 10, of which see infra.

Woodcroft v. Thompson,

³ Lev. 48. Gimbart v. Palah, Stra. 1272.

Walker v. Rumbold, Ld.
 Raym. 53. s. c. 12 Mod. 76.
 Per Holt, C. J., Id.
 Gouldsb. 100.

person: 3 thus, where three persons distraine of sheep and severally impounded them several pounds, it was held that they shou but one sum of five pounds, and one amount damages.4

Impounding the premises.

At the present day, however, in cases of the distress on for rent, these enactments, as well as the the foregoing regulations respecting the pou for the most part ceased to be of any practice tance: for now the landlord, instead of bei pelled, as formerly, to remove and impo distress off the premises, is at liberty to the more convenient and therefore most usu of impounding it in the place where it i This is provided by the statute 11 Geo. 2, c.1 which enacts that any person lawfully taking a for any kind of rent may impound or otherwis the distress, of what nature or kind soever. place, or on such part of the premises ch with the rent, as shall be most fit and conver

If the distress be impounded on the premis the authority of this statute, its provisions sl strictly complied with; the goods should altogether into one convenient place, (as into two rooms which may be suitable for the p

It may be proper to mention here that a pound-keeper is bound to receive every thing offered to his custody, and is not answerable whether the thing were legally impounded or not: Branding v. Kent, Cowp. 476; s. c. 1 T. R. 62; an action of trespass, therefore, will not lie against him for merely receiving a distress, though the original taking be tortious; for the pound being the custody of

the law, if the di wrongfully taken trainer is answerab When the cattle are pounded, he cannot go without a replev consent of the p however, the pour go one jot beyond and assent to the that may be a differ Neither can a pour bring an action if t be broken, but it brought by the 1 terested. Har. Wo Ten. 330, 3rd ed.

³ Rex v. Clarke, Cowp. 612.

⁴ Partridge v. Naylor, Cro. Eliz. 480; s. c. Moor, 453.

and possession kept of that only; unless the consent of the owner to the contrary be obtained. An implied assent on the part of the owner is sufficient, and very slight evidence will support it;5 yet it is of course advisable for the distrainer to procure it in express terms and in writing.6 In a recent case, where a landlord made a distress in a cottage, and locked up the premises altogether, it was ruled, that if the locking up of the cottage were done to secure the goods, the landlord had a right to do it, as he might impound the goods on the premises, and to secure them lock them up.7 This seems a very extreme case, depending probably on its own peculiar circumstances, as it may have appeared that the locking up the whole premises was the necessary and only afficient way of impounding thereon; but the precedent might be of very dangerous application in practice. The rule we have given above is fully warranted by a previous case already cited, where household furniture having been distrained and suffered to remain untouched in different apartments. which during the five days were visited by the bailiff, it was held, that without the implied assent of the owner to such a course, the bailiff was liable to an action of trespass.8 The question is one of considerable importance, as will be evident when we come to speak of a tender of the rent after the distress and before the impounding; and it is submitted that an impression which seems to have obtained, that where goods are impounded on the premises the distress and impounding are identical, is erroneous.

Thus we have seen that at common law all the things distrained were required to be impounded off the premises, and that since the statute 11 Geo. 2, c. 19, s. 10, they may be impounded either on, or off,

⁶ Washborn v. Black, 11 East, 405. In this case the only evidence of assent was, that the plaintiff had said how much she was obliged to Mr. M. who had acted like a gentleman.

⁶ See the next form, post,

⁷ Cox v. Painter, 7 C. & P. 767; (Parke, B.)

⁸ Washborn v. Black, 11 Fast, 405.

⁹ See post, c. 5.

at the option of the distrainer. This option, however, though applicable to every thing distrainable at common law, is subject to some exceptions which it will be proper to mention: and therefore we shall notice here the provisions of two statutes, which have readered distrainable certain things exempted at common law, but have at the same time directed them to be treated in a particular manner.

First, the statute 2 Will. & M. sess. 1. c. 5, which gave the power to distrain sheaves or cocks of com. or corn loose or in the straw, or hav lying in a barn or granary, or on a hovel, stack or rick, or otherwise, upon any part of the land or ground charged with the rent, and to lock up and detain the same in any place where the same shall be found, and after appraisement authorized the sale of the goods, if not replevied, has provided that corn, grain, or hav so distrained, shall not be removed by the person distraining, to the damage of the owner thereof, out of the place where the same shall be found and seized: but shall be kept there (as impounded) until the same shall be replevied. These objects of distress, therefore, are incapable of removal, and must be impounded on the premises.1

And secondly, the statute 11 Geo. 2, c. 19, s. 8, which authorized the landlord or lessor to take and seize all sorts of corn and grass, hops, roots, fruits, pulse, or other product growing on any part of the premises demised, as a distress for arrears of rent, has provided that the same shall be cut, gathered and laid up, when ripe, in the barn or other proper place on the premises; and in case there shall be no barn or proper place on the premises, then in any other barn or proper place, which such lessor or landlord shall procure for that purpose, and as near as may be to the premises. And therefore the things made distrainable by this statute cannot be impounded off the premises, except in default of there being a proper place upon the premises for that purpose.²

¹ Per Parke, B., 1 M. & W. ² Per Parke, B., 1 M. & W. 448.

en the distress is impounded, whatever it may Distress how d whether it lie in a pound overt or covert, or to be treated. ured on or off the premises, the distrainer canse or work it; for he has only the custody of it ledge: but the owner may make what profit of an, whilst it remains impounded. The common this respect was so strict, that if the distrainer anv use of the distress, it rendered him (accordthe rule which we have frequently noticed) a sser ab initio.3 This indeed is now altered by tatute 11 Geo. 2, c. 19, s. 19; but he is still to an action to recover damages for such abuse. very use of the thing distrained is considered as use of it, so that it cannot be justified, even by ing beneficial to the distress itself. For alh it has been said, that if a man distrained ir. he might cause it to be scoured to avoid or that if he distrain raw cloth, he may cause pe fulled, because it is for the owner's benefit:4 the same case where this was so laid down it ecided, that raw hides could not be tanned, alh alleged to have been done to preserve them rotting. There is however an exception to this al rule in the case of milch kine, which (it seems) e milked by the distrainer.5

would clearly be recognized as law at the present day. Wood. Land. & Ten. by Har. 331 n. (b.) 3rd ed.

Cattle taken as a distress in withernam are in a very different situation, for they are delivered to the party in lieu of his own cattle, and may consequently be milked and worked in a reasonable manner. 1 Roll. Abr. 889; 1 Leon. 220. Com. Dig. Dist. (D. 6.)

d v. Monger, 6 Mod.

r Popham, J., Duncomb н. Cro. Eliz. 783. gshaw v. Goward, Cro. 148. Bac. Abr. tit. s, (D. 2.) It has inpeen held aliter; see erlayn's case, 1 Leon. Owen, 124; Noy, 119; Abr. 673. l. 32; 9 Vin. 1.8; but the reason of ing is so forcible, that tum in Cro. Jac. 148,

SECTION V.

Distress for Rent how to be disposed of.

We have already seen that at common law a distress for rent when made was merely a pledge in the hands of the distrainer, and could not be sold; and that consequently, although such a distress put the owner to inconvenience and was so far a punishment to him, yet if he continued obstinate, and would make no satisfaction or payment, it was no remedy at all to

the distrainer.6

for rent-service;

We have seen also that this inconvenience was remedied in the case of a distress for a rent-service by the statute 2 Will. & M. sess. 1. c. 5, s. 2, which Sale of distress first authorized the sale of the distress. The terms of the enactment are, "that where any goods shall be distrained for rent reserved and due upon any demise, lease, or contract whatsoever; and the tenant or owner of the goods so distrained shall not, within five days next after such distress taken, and notice thereof, with the cause of such taking, left at the chief mansion house or other most notorious place on the premises, replevy the same; in such case the person distraining shall, with the sheriff or undersheriff of the county, or with the constable of the hundred, parish, or place where such distress shall be taken, cause the goods so distrained to be appraised by two sworn appraisers, (whom such sheriff, undersheriff, or constable shall swear to appraise the same truly, according to the best of their understanding,) and after such appraisement, may sell the same for the best price that can be gotten for them, for satisfaction of the rent and charges of distress, appraisement, and sale; leaving the overplus, if any, with the sheriff, under-sheriff, or constable, for the owner's use." And the sect. 3, of the same statute, after authorizing the distress of sheaves or cocks of corn, or corn loose or in the straw, or hay lying or being in any barn or

⁶ Ante, p. 11.

a wandadicaso.

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granary or upon any hovel, stack or rick, or otherwise upon any part of the land or ground charged with the rent, and the impounding of such distress upon the premises until replevied, enacts that it shall and may be lawful, in default of replevying the same within the time aforesaid, to sell the same after such appraisement thereof to be made; so as nevertheless the same shall not be removed from the premises, but be kept there, until replevied, or sold in default of replevying within the time aforesaid. So the statute 11 Geo. 2, c. 19, ss. 8, 9, which empowers lessors and landlords to distrain for rent all sorts of grass, hops, roots, fruits, pulse, or other product growing on my part of the land demised, and to cut, carry, and by it up when ripe on the premises, or elsewhere near if there be no proper place on the premises; goes on to enact that it shall be lawful in convenient time to appraise, sell, and dispose of the same towards misfaction of the rent and charges, in the same manher as other goods and chattels may be seized, distrained, and disposed of. Provided, that notice of the place where the goods so distrained shall be lodged or deposited, shall, within the space of one week, be given to such lessee or tenant, or left at the last place of his abode; and that if after such distress, and at any time before the crops distrained shall be ripe and cut, the tenant, his executors, &c. shall pay to the lessor or landlord, or his steward or other person usually employed to receive the rent of such lessor or landlord, the whole rent in arrear, together with the costs and charges of the distress; that then upon such payment or lawful tender thereof actually made, such distress shall cease, and the things so distrained shall be delivered up to the tenant.

This power of sale granted in case of a distress for for rent-se rent-service by statute 2 Will. & M. sess. 1, c. 5, s. 2, was extended to a distress for rent-seck by the statute 4 Geo. 2, c. 28, s. 5, as we have before observed.

⁷ Ante, p. 14, 32.

or rentharge.

But neither of these statutes mentioned rentcharges; and it is said that some doubt has existed how far the grant of a rent-charge alone would confer a power to sell goods distrained under it.8 It seems, however, that the sale of a distress for a rent-charge is clearly authorized by the terms of the statute ll Geo. 2, c. 19, s. 10, which we have already noticed in part, and which (as authorizing, not only the impounding, but also the sale of the distress on the premises,) it becomes necessary to state more fully in this place. The statute enacts that it shall be lawful for any person or persons lawfully taking any distress for any kind of rent to impound or secure the distress on a fit and convenient part of the premises, and to appraise, sell and dispose of the same upon the premises, in like manner and under the like directions and restraints to all intents and purposes as any person taking a distress for rent may do off the premises by virtue of the statutes 2 Will. & M. sess. 1, c. 5, and 4 Geo. 2, c. 28, and that it shall be lawful for any person or persons to come and go to and from such place or part of the said premises, where any distress for rent shall be impounded and secured as aforesaid, in order to view, appraise, and buy, and also in order to carry off, or remove the same on account of the purchaser thereof.

Sale of cattle listrained, under 5 & 6 Will. 4, c. 59.

Besides the above enactments, we may mention cursorily in this place that the statute 5 & 6 Will. 4, c. 59, s. 4, after requiring that a person impounding any horse, ass, or other cattle or animal, shall supply the same daily with good and sufficient food, and empowering him to recover not exceeding double the value of the food so supplied by application to a justice of the peace, provides, that he shall be at liberty, if he think fit, instead of proceeding for the recovery

train and dispose of corn, grain, or other produce growing upon the land, did not extend beyond the case of landlord and tenant; but he does not allude to sect. 10, of that statute: see infra.

⁸ Lumley on Rent-charges, 383. The learned author, after noticing the two statutes mentioned above, goes on to say, that the statute 11 Geo. 2, c. 19. s. 8, wherehy landlords were authorized to dis-

of it by that means, after the expiration of seven clear days, from the time of impounding the same, to sell any such horse, ass, or other cattle or animal, openly at any public market (after having given three days' public printed notice thereof) for the most money that can be got for the same, and to apply the produce in discharge of the value of such food so supplied, and the expenses of and attending such sale, rendering the overplus, if any, to the owner of such cattle or animal.

The statute 2 Will. & M. sess. 1, c. 5, s. 2, has Sale of distret been held not to be compulsory: so that in no in- not compulstance of a distress for rent of things distrainable at sory; common law, and at the time that act was passed, is the distrainor compelled to proceed to sell the distress; he may, if he think proper, forbear to do so, and merely retain it as a pledge as at common law.9 But except in it seems that a different construction must be put certain cases. upon the provisions of sect. 3, of that statute and rect. 8, of the statute 11 Geo. 2, c. 19; and that a distress, under those sections, of corn and hay, and growing corn and other produce, (the latter after it is cut and laid up,) must be sold. This construction is equally according to the circumstances and reason, as according to the terms, of the above enactments: for these things were previously exempted from distress at common law on account of their perishable nature; and it was nothing but the conferring of the power to sell the pledge, that so far changed the nature of the remedy, as to admit of their being distrained; so that it was necessary, as to those things which were declared distrainable only in respect of the sale, to make the sale compulsory.

In the event of a sale, the five days allowed by At what time the statute 2 Will. & M. sess. 1, c. 5, and before the distress the expiration of which the distress cannot be sold, may be sold. are to be calculated inclusive of the day of the sale, but exclusive of the time of the sale; that is to say, they

Hudd v. Ravenor, 2 B. &
 B. 662; s. c. 5 Moore, 542;
 Lear v. Edmonds, 1 B. & Al.
 157; Lingham v. Warren, 2

B. & B. 36.

¹ See per Parke, B., 1 M. & W. 448.

consist of five times twenty-four hours: so that, where a distress was made and a regular notice given on the morning of the 12th day of May, a sale on the afternoon of the 17th day of the same month was held to be regular; because the five days expired on the morning of the latter day.² But where a distress was made on the afternoon of Friday, a sale on the morning of the Wednesday following was decided to be wrongful, five times twenty-four hours not having

elapsed.8

Should the distrainer choose to sell, as well as to impound, the goods upon the premises, he is not, of course, obliged to remove them immediately on the expiration of the five days, but is by law allowed a reasonable time afterwards to appraise, sell, and dispose of them.⁴ If, however, in such case he suffer them to remain beyond such reasonable time, or in case they are to be sold off the premises, or are not to be sold at all but merely to be retained as a pledge, and are not removed at the end of the five days. (unless the tenant's consent to their remaining be obtained,) he becomes a trespasser:5 thus, where the defendant entered under a warrant of distress for rent in arrear, and continued in possession of the goods upon the premises fifteen days, during the last four of which he was removing the goods, which were afterwards sold under the distress; it was held, that he was liable to an action of trespass, for continuing on the premises, and disturbing the plaintiff in the occupation of his house beyond the time allowed by law.6 What may be considered a reasonable time, after the expiration of the five days, for the sale and removal of the goods is a question for a jury, as every case must depend upon its own particular circumstances.7

² Wallace v. King, 1 Hen.

³ Harper v. Taswell, 6 C. & P. 166.

⁴ Pitt v. Shew, 4 B. & Al.

Griffin v. Scott, 2 Str.

^{717;} s. c. 3 Ld. Raym. 1424.

6 Winterbourne v. Morgan,
11 East, 395; Etherton v.
Popplewell, 1 East, 139.

7 Pitt v. Shew, 4 B. & Al.
208.

How to be disposed of.

But it frequently happens that it is desirable for the tenant's sake, and advantageous for him, that the goods should not be sold so soon as the law permits,—either to allow him a protracted opportunity of redeeming them by paying the rent, or of improving the sale by sufficient advertisement;—and in such cases, if they are impounded on the premises, it is usual for the tenant to give a consent for their remaining there for a longer period in the custody of the distrainer. If such consent be given, it is of course prudent, though not absolutely necessary, to have it in writing. (f) It may be observed, that if goods distrained are impounded on premises where there is a subdemise to an under-tenant or lodger, and they are intended to be kept there beyond the five days, the object of a consent, namely, to avoid a trespass, must be kept in mind, and the consent of all persons obtained, on whom a trespass would otherwise be thereby committed. For the necessary consent has relation to the possession or right of possession of the place, and not to the right of ownership of the goods.

After such a consent on the part of the tenant, the goods should not be sold before the expiration of the time agreed upon.⁸

(f) It may be in the following form:—
"Mr. A. B.,

I hereby request you will keep possession of my goods, which you have this day" (or as the case may be) "distrained for rent due" (or, "alleged to be due) from me to you, in the place where they was are, being in the (— room on the — floor of the) house, No. — street, in the county of — "(being the premises where the distress was made) "for the space of — days from the date hereof, and I hereby agree to the same, and promise to say the expenses of keeping the said possession, on your under-aking to delay the sale of the said goods and chattels for that pace of time, in order to enable me to discharge the said rent. Witness my hand this — day of — 18—.

Witness, Y. Z. C. D."

⁸ It has been held that a lelay of the sale in consequence of such an arrangenent between the landlord

and tenant is no proof per se of collusion as against creditors. Harrison v. Barry, 7 Price, 690.

Distress for Rent,

In a case where a landlord, at the tenant's request, detained a distress beyond the five days, he was held not to be liable to an action at the suit of the tenant's lodger, to whom part of the goods belonged, if he did not know which were the goods of the lodger, and which those of the tenant.9

Where standing corn and growing crops were seized as a distress for rent before they were ripe, and were sold within four days, it was held that the tenant could not maintain an action on the case, under the statute 2 Will. & M. sess. 1, c. 5, s. 28, against the landlord or his bailiffs for selling before the five days or a reasonable time had elapsed, a sale under such circumstances being wholly void, and the plaintiff having sustained no legal damage from it.1

Whilst the goods remain unsold the tenant may at any time replevy them, as well after as before the five days; and neither the removal nor appraisement

takes away his right to do so.2

9 Fisher v. Algar, 2 C. & P. 374. (Best.) It was an action on the case by the tenant's lodger, against the landlord and broker; and one of the counts in the declaration appears to have been for not selling at the end of the five days, but detaining the distress beyond that time. No objection scems to have been taken to that count; and the observations of the learned chief justice appear to have sanctioned its validity, by resting the defence on the ground of the tenant's consent, and of the landlord's ignorance of the identity and ownership of the goods. But it is apprehended that such a count could not be supported, and that this view of the case was altogether buside its real merits. The tenant's consent was necessary, not to enable the distrainer to delay the sale (for he was not compellable to sell at all, see supra.) but merely to continue the impounding on the premises. It was enough for the lodger, that his goods had been lawfully distrained, as being found upon the premises out of which the rent issued, and that they were properly impounded without any trespass committed upon him. Nothing of the latter kind appears to have been complained or, nor, indeed, was the form of action applicable.

1 Owen v. Legh, 3 B. & Al.

"Jacob v. King, 5 Taunt. 450; 1 Chit. Rep. 196; 1 M. & W. 449.

the goods are sold the distrainer must Appraisement n appraised by two sworn appraisers: for condition precedent required by the statute; an appraisement is made the landlord has to sell, but only to keep. If the landlord goods without an appraisement, it is an ity within the statute 11 Geo. 2, c. 19, der which provision the tenant will be enrecover satisfaction for the damage actually 1 no more,—that is to say, the difference the fair value of the goods to him, and the of rent discharged by the produce of the

ersons chosen as appraisers must be disining the distress; and, therefore, the partyng cannot be sworn as one of them: 6 indeed, only interested in the business, but is exacluded by the terms of the statute, which it he, with the sheriff, &c., shall cause the be appraised by two sworn appraisers. The

. & M. sess. 1, c. 5, ems necessary that uld still be two praisers under this all cases. Bishop v. C. & P. 484. It is the schedule of a ite, 57 G. 3, c. 93, ating the expenses es for rent not ex-20) speaks of an ent "by one broker ' and it has been Lord Lyndhurst at previously to the ited, that in a case hin this latter star one sworn aprequired. Fletcher s, 6 C. & P. 749; & Rob. 375. But or by the statute 1. sess. 1, c. 5, great ere given to the to the detriment.

however justly, of the tenant; and it is submitted that there does not appear sufficient in merely an anomalous and unexplained expression in the schedule of a subsequent act, to authorize the landlord, in any case, to exercise those powers otherwise than as that statute, for the protection of the tenant, directs.

⁴ Knotts v. Curtis, 5 C. & P. 323.

⁵ Id.; Biggins v. Coode, 2 C. & J. 365. A party who purchases goods distrained and sold without a previous appraisement has still a sufficient title to maintain trover. Lyon v. Weldon, 2 Bing, 334.

⁶ Westwood v. Cowne, 1 Str. 172; Andrews v. Russell, Bull. N. P. 81; Lyon v. Weddon, 2 Bing. 334; s. c. 6 Moore, 629. person distrained upon may, if he choose, dispense with those formalities otherwise required by law: so that, in a case where he requested, in order to save expense, that appraisers might not be called in, and in consequence the broker who made the seizure himself valued the goods, it was held, that he could not afterwards complain of that as an irregularity which had been done at his own instance.

The statute requires the appraisers to be sworn by the sheriff, or under-sheriff, or by the constable of the hundred, parish, or place, where the distress is taken; and it was formerly thought that any constable of the hundred was sufficient for that purpose;8 but it has been recently held, that they must be sworn before the constable of the parish itself, as the constable of the adjoining parish cannot interfere, although the proper constable is not to be found when wanted.9 But where a distress was made for an entire rent of land, of which parts were situate in two different hundreds in two different counties, and the two appraisers were sworn only in the one hundred, and by the constable of that hundred where the distress was impounded, but in the presence of the other constable, it was held good.1

The constable must attend with the appraisers at the time of the appraisement, and must swear them (f) before they make it.² The oath should be administered in the presence of some person who may after-

484.

⁽f) The oath may be administered to the appraisers in the following form:—

[&]quot;You and each of you shall well and truly appraise the goods and chattels mentioned in this inventory," (the constable at the same time holding the inventory in his hand, and shewing it to the appraisers) "according to the best of your judgment. So help you God."

⁷ Bishop v. Bryant, 6 C.& P.

⁸ Walter v. Rumball, Ld. Raym. 53; s. c. 12 Mod. 76. ⁹ Avenell v. Croker, 1 M.

[&]amp; M. 172; Wallace v. King,

¹ Hen. Bl. 13.

¹ Walter v. Rumball, Ld. Raym. 53; s. c. 12 Mod. 76; 4 Mod. 395.

² Kenney v. May, 1 M. & Rob. 56.

ttest it; and it is usual to indorse a memoof its having been done on the inventory. (g) the appraisers have been duly sworn, they roceed to view and value the goods. Their ment, also, should be written upon the in-, and be signed by them. (h)

sheriff's office should be searched before any The sale. es place, to ascertain whether the goods have plevied; and if they have not, and the rent rges are still unpaid, at the expiration of the time the goods should be sold for the best

hich may be as follows:—
orandum, that on the —— day of ——, 18—, G. H.
and J. K. of ——, two sworn appraisers, were sworn
holy evangelists, by me L. M. of ——, constable," (or
'or "under-sheriff,) well and truly to appraise the
l chattels mentioned in this inventory, according to the
eir judgment. As witness my hand.

L. M., Constable.

t the time of swearing id G. H. and J. K. as and witness thereto,
W. S."

nemorandum being a mere note of the oath having ninistered need not be stamped. See *Dunn* v. *Lowe*, 193; s. c. 12 Moore, 407.

may be in the following form:—
the above named G. H., and J. K., being sworn upon
evangelists, by L. M. the constable? (or "sheriff" or
heriff) above named, well and truly to appraise the
1 chattels mentioned in this inventory, according to the
ur judgment, and having viewed the said goods and

ur judgment, and having viewed the said goods and lo appraise and value the same at the sum of £——, nore. As witness our hands the —— day of ——, G. H. J. K.

S. Sworn Appraisers."

In to be affixed upon such appraisements ds and chattels, where the amount of the on shall not exceed £50, must be ... 0 2 6 re it shall exceed £50, and not exceed 0 5 0 re it shall exceed £100, and not exceed 0 10 0 re it shall exceed £200, and not exceed 0 15 0 re it shall exceed £200 0 15 0 re it shall exceed £500 1 0 0

price that can be got for them. The whole price if necessary, should be applied in satisfaction rent and the lawful expenses of the distress, a ment, and sale; but if the produce be more the ficient for that purpose, the overplus, after payments, should be left in the hands of the under-sheriff, or constable—usually, of course latter—for the use of the owner of the got trained. As the reasonable expenses, as we rent, are to be deducted from the proceeds sale before handing over the remainder, it hald, that in an action on the case for not leavoverplus in the hands of the sheriff, under or constable, for the plaintiff's use, the plaintiff question the reasonableness of the charges.

When the goods are valued, it is not unu the appraisers to buy them at their own va and a receipt at the bottom of the invento nessed by the person who swore them, is held a sufficient discharge. But if the distre considerable value, it is much more advis have a proper bargain and sale, between the l and the person who swears them, the appraise the purchaser, for the better proving the tran afterwards, if there should be occasion. A sold at the appraised value is intended by to have been sold at the best price, since praisers were sworn. It is in no case nece have a sale by auction.

³ Lyon v. Tomkies, 1 M. & W. 603; s. c. 1 Tyr. & Gr. 810.

⁴ 2 Will. & M. sess. 1, c. 5,

⁵ Lyon v. Tomkies, 1 M. & W. 603; s. c. 1 Tyr. & Gr. 810. In the same case, where the plaintiff herself received from the broker the balance remaining after payment of the rent and the actual charges, making no objection as to their reasonableness, it was held to be a question for

the jury whether she such balance in sat and if not, whether fact sufficient to sa real balance; and th not correct to lay it matter of law that s ment andree lipt sub satisfied the requisithe statute.

 ⁶ Gilb. Dist. by Im
 ⁷ Walter v. Rumbe
 Raym. 53; s. c. 12
 1 Salk, 247.

It has been held, that upon a count for not selling goods at the best prices, the plaintiff may go into evidence to show that the goods were allowed to stand in the rain, and that they were improperly allotted.8

Care must be taken not to sell any thing which was not actually distrained, (and of what the distress consisted the inventory is evidence,) otherwise the listrainer will render himself liable.

It is not necessary to observe any particular order n the sale of goods; so that though beasts of the slongh cannot be lawfully distrained when there is my other sufficient distress on the premises, yet, if hey are once distrained, it is not necessary to postone their sale to that of the other goods.¹

We have already seen, that where corn, grass, tops, roots, fruits, pulse, or other product, growing any part of the premises demised, have been disrained and afterwards cut, gathered, and laid up then ripe, under the authority of the statute 11 Geo. 1, c. 19, ss. 8, 9, they may be appraised, sold, and asposed of, like other goods and chattels; provided the necessary notice has been given, and they have not been previously replevied, or redeemed by payaent of the rent and charges.²

And where, in case of a fraudulent removal of the mant's goods, the landford has seized them as a istress, under the provisions of the statutes 8 Anne, . 14, s. 2, and 11 Geo. 2, c. 19, s. 1,³ they may be old or otherwise disposed of, in the same manner as they had been distrained on the premises.

⁸ Pointer v. Bukley, 5 C. P. 512.

⁹ Sims v. Tuffs, 6 C. & P. 7; Bishop v. Bryant, id.

Jenner v. Yolland, 2 Chit. 167; s. c. 6 Price, 5.

² Ante, p. 12; 151.

³ Ante, p. 126, 7.

SECTION VI.

Expenses of a distress for rent.

We have seen that by the terms of the 2 Will. & M. sess. 1, c. 5, s. 1, the distraine deduct from the amount of the produce of the sold, besides the rent, all reasonable charges a ing the distress.4

Costs of a disrent does not exceed £20.

The costs of a distress levied for rent not exc tress where the 201. are regulated by the statute 57 Geo. 3, which, after reciting that divers persons acti brokers and distraining on the goods and chat others, or employed in the exercise of such dist had of late made excessive charges, to the oppression of poor tenants and others, and that expedient to check such practices, enacts, "t person making any distress for rent, where th demanded and due shall not exceed 201. for a respect of such rent, nor any persons what employed in any manner in making such distr doing any act whatsoever in the course of distress, or for carrying the same into effect have, take, or receive out of the produce of the or chattels distrained upon or sold, or from the distrained on, or from the landlord, or from any person whatsoever, any other or more cos charges for and in respect of such distress matter or thing done therein, than such as are and set forth in the schedule thereunto annexed appropriated to each act which shall have beer in the course of such distress: and no person make any charge whatsoever for any act, mat thing mentioned in the said schedule, unless su shall have been really done."

By sect. 2, it is enacted, "that if any perpersons shall in any manner levy, take, or 1 from any person whatsoever, or retain or take the produce of any goods sold for the payn

⁴ Ante, p. 160.

⁵ See post, p. 164.

it, any other or greater costs and charges mentioned and set down in the said schedule. : any charge whatsoever for any act, matter, mentioned in the said schedule and not one, the party aggrieved by such practices ply to any one justice of the peace for the city, or town, and acting for the division uch distress shall have been made, or in any proceeded in, for redress; whereupon such shall summon the person or persons comof to appear before him, and shall examine matter of such complaint, and also hear the of the person or persons complained of; and ill appear to such justice that the person or complained of shall have levied, taken, reor had, other and greater costs and charges, mentioned or fixed in the said schedule, or ly charge for any act, matter, or thing men-1 the said schedule and not really done, such shall order and adjudge treble the amount of nies so unlawfully taken to be paid by the r persons so having acted to the party who ve made complaint thereof, together with full nd in case of non-payment, shall issue his to levy the same by distress 6 and sale of the id chattels of the party ordered to pay such or costs, rendering the overplus (if any) to the cowners, after payment of the charges of such and sale; and in case no sufficient distress had, he shall commit the party to prison, remain until such order or judgment be

4, provides "that such justice, if he shall complaint of the party or parties aggrieved ell founded, shall order and adjudge costs, eding 20s., to be paid to the party or parties

ost, Book, 3.

3, empowers the summon and swear at the request of complaining; who

are bound to obey, unless for some reasonable or lawful excuse, under a penalty of 40s. to be recovered by distress or commitment as in sect. 2.

complained against; which order shall be c into effect and levied and paid in such manne with like power of commitment as is therein directed, as to the order and judgment found such original complaint: provided always, nothing therein contained shall empower such j to make any order, or judgment against the lord for whose benefit any such distress shall been made, unless such landlord shall have pers levied such distress; and that no person who sl aggrieved shall be barred from any legal or suits or remedy which he might have had before passing of the act, excepting so far as such com shall have been determined by the order and ment of the justice, and which may be give evidence under the plea of the general issue cases, where the matter of such complaint sh made the subject of any action."

The following is the schedule of costs and cl referred to in the above statute:

Levying distress - - - - 0
Man in possession per day - - 0
Appraisement, whether by one broker or more, 6 dd. in the pound on the value of the goods.

Stamp, the lawful amount thereof.
All expenses of advertisements, if any, Catalogues, sale and commission and delivery of goods, 1s. in the pound on the net produce of the sale.

As the statute by its terms is confined to dist where the sum demanded and due shall not a 201., it does not extend to a case where more 201. is distrained for, although the goods takappraised at, and sold for, less than 201.9

Where the amount of rent distrained for e the sum of 201. the costs of the distress are no by any statutory regulation. The general pr

costs of a disress where the ent exceeds 01.

See ante, p. 157, n. 3.
 Child v. Chamberlain, 5 B.
 Ad. 1049; s. c. 3 Ne
 520; 6 C. & P. 213.

owever, appears to be, to charge one shilling in the bund for the levy, and two shillings and sixpence per my for the man in possession, if the tenant keep m, and three shillings and sixpence if he keep mself.

The statute 1 & 2 P. & M. c. 12, s. 2, enacts that person shall take for keeping in pound, impoundg, or poundage of any manner of distress, above is sum of fourpence for any one whole distress, that sall be so impounded; and where less has been used iere to take less; upon the pain of five pounds to a paid to the party grieved, over and beside such oney as he shall take above the sum of fourpence; ay usage or prescription to the contrary in anywise of the extend to cases where the goods are impounded in the premises by virtue of the statute 11 Geo. 2, . 19, s. 10.1

By the above statute 57 Geo. 3, c. 93, s. 6, it is Copy of nacted that "every broker, or other person, who charges to hall make and levy any distress whatsoever shall rive a copy of his charges, and of all the costs and harges of any distress whatsoever, signed by him, othe person or persons on whose goods and chattels my distress shall be levied, although the amount of ent demanded shall exceed the sum of 201." Upon his last section of the act it has been held, that it pplies only to cases where the goods have been old. And, where it does apply, that a landlord, not versonally interfering in the distress, is not liable for he omission of the broker to give a copy of his harges.

ld.

The schedule of expenses bove-cited will suggest an ppropriate form.

³ Hills v. Street, 5 Bing.

⁴ Hart v Leach, 1 M. & W. 560; s. c. 1 Tyr. & Gr. 1010.

CHAPTER V.

BY WHAT MEANS THE RIGHT OF DISTRESS FOR MAY BE TAKEN AWAY.

In considering, as we have done in the fo chapters, by whom and in what cases a dist rent can be made, it has not been difficult to i converse—that is to say, by whom and in wh a distress for rent cannot be made. And, th it is not intended in this place to dwell upon t of those requisites, in the absence of which can ever be created, and consequently no distress can ever accrue. Where, for exampl is no actual demise at a fixed rent 1; or when is merely a sum reserved or granted to be issu of personal property, or incorporeal heredita it must already be sufficiently clear that the of distress is not applicable to such cases. appears to be of practical importance to con present severally and distinctly by what me right of distress, where it has once existed. taken away; whether those means, as in the of a tender of the rent due at the proper t place,3 take away the power to distrain sin some particular amount accrued; or whet those which we shall proceed to notice in place, they altogether determine the existence rent and all remedy by distress for the rec arrears.

By the expiration of the term.

This effect, we have seen, was produced at law by the expiration of the term;—the lesse no longer distrain for any arrears which might to him at that time.⁴ For, by the determin the tenancy, the privity of estate on which tress in such case depended was absolutely de and as well the rent itself in future, as the exercise that particular species of remedy was

¹ See ante, p. 19, et seq.

² ld.

<sup>See infra.
See ante, p. 12,</sup>

1 end. The statute 8 Anne, c. 14, ss. 6, 7, has ed partly removed this disability of the common so that now any person having rent in arrear any lease for lives, years, or at will ended or dened, may after the determination of such lease in for the arrears, as he might have done if the had not been ended; provided, that such distress ade within six calendar months after the detertion of the lease, and during the continuance of undlord's title or interest, and during the possesof the tenant from whom such arrears became

It will be superfluous to enlarge upon this enent at present, as we have already fully coned the scope of its provisions, according to the ions on the subject,—as well as the late statute 4 Will. 4, c. 42, ss. 37, 8, which has extended e power of distress under like circumstances to executors and administrators of the lessor in the t of his death. These statutes, it will be obd, do not apply to cases of rent-charge, in which arse the determination of the power of distress strictly depend on the terms of the grant. And ases of rent-service, unless the remedy be ised within the time given, and under the cirances expressed, the expiration of the tenancy ave barred the distress for ever.

very frequently happens that after the expiration erm the tenant continues to occupy the pre-; but in such case, (it may be again remarked no distress can be made for any amount ed to have accrued subsequently; unless, to it, there be something amounting to a new y at a fixed rent.⁶ And wherever a landlord any way acted so as to disclaim or rebut the nption of an existing tenancy—as if he has d the occupier of his premises as a trespasser, cting him.7—he cannot afterwards distrain on or rent. This has been held even in a case

e ante, p. 122. mer v. Whitehouse, 1

⁷ Doe dem. Holmes v. Darley, 8 Taunt. 538. Rob. 213; see ante,

where the ejectment was directed against the claim at third person who came in and defended in lieu of the occupier, and the occupier was aware of that circumstance, and was never turned out of possession.

By the determination of the lessor's interest. Where the tenancy has been put an end to, and a privity of estate has ceased by the determination of the lessor's interest in the premises, a distress by hin afterwards would of course be illegal. We have already referred to a decision to this effect—that a termor after the expiration of his term could not distrain on his under-tenant, where the under-tenant although continuing in possession, refused to acknowledge him as landlord.⁹

By the extinction of the rent.

So whatever operates as an extinction of the rent necessarily determines the right of distress; whether it be in the case of a rent-service, as by the tenant's eviction from the land by title paramount, or by act of his landlord's purchase of the tenancy; or in the case of a rent-charge, as by the grantee purchasing or releasing all his right in all or even part of the land out of which the rent issues, or releasing the rent itself. We have formerly seen that a rent may be sometimes extinguished in part only; in what cases it may be apportioned; and also that it may be suspended for a time, and afterwards revive.

By the lessor parting with his reversion, saving the rent. In like manner the remedy of distress was destroyed at common law, where a rent-service was converted into a mere rent-seck, by the person to whom it was reserved granting over, without the rent itself, the reversion to which it was incident. In most cases, however, at the present day the same result no longer ensues, since the statute 4 Geo. 2, c. 28, s. 5, has given a power of distress for a rent-seck. 5 But still, where a rent-service has been

⁸ Bridges v. Smyth, 5 Bing. 410; s. c. 2 M. & P. 740.

⁹ Burne v. Richardson, 4 Taunt. 720; ante, p. 122.

¹ Hopcraft v. Keys, 9 Bing.

³ See ante, p. 34.

<sup>See ante, p. 39.
See ante, c. 1, s. 2.</sup>

⁵ See ante, p. 32. But quære whether any arrears due at the time of an assignment of the reversion could be recovered by distress, for they

ed on an under-lease of a term of years, and ib-lessor afterwards parts with the reversion, ing the rent, as this has been decided not to be a rent-seck distrainable under the statute, but annuity, the act of parting with the reversion uses to have the original effect of destroying the us power to distrain.⁶ We have seen, that ver the reversion is granted, without an express ion of the rent, the rent passes with the reversion troyed or merges, the rent becomes extind.⁸

merger of the reversion, as being a means by By the merger the rent and distress are altogether taken away, of the revervith advantage be further illustrated. Thus sion.

a man made a lease for one hundred years, a lessee made an under-lease for twenty years, ing rent; the first lessor granted the reversion, and the grantee purchased the reversion of m of twenty years; it was held that he was titled to the rent, for the reversion of the term ch it was incident was merged in the reversion. So if a tenant for term of years under-lease less term, and then assign his reversion, and signee take a conveyance of the fee, his former ionary interest becomes merged, and the rent sequently extinguished. But if the lease on the rent is reserved were originally derived out inheritance in fee, the extinction of a particular

seem to be not rent-

it still arrears of rentafter the destruction privity of estate.

ente, pp. 29, 54, and

sthere cited. But in tance, according to the

s, parting with the

m takes away the disy reducing the rent

a rent-seck, but to a

nnual sum. e ante, p. 27.

⁸ Id. But it will be remembered that where a lease, out of which other leases have been derived, is surrendered for the purpose of renewal, the extinguishment is prevented by the statute 4 Geo. 2, c. 28, s. 6, ante, p. 80, n. 4.

⁹ Threr v. Barton, Moore, 94.

¹ Webb v. Russell, 3 T. R. 393.

estate subsequently created would not of course affect the remedy against the lessee for the rent. has been laid down that where a man seized in fee makes a lease for years, reserving rent, and afterwards grants the reversion for life or for years; if the grantees surrender this estate for life or years to the reversioner, the reversioner shall nevertheless have the rent, since the reversion out of which it was derived, and to which it was incident, still subsists.² And the same principle would apply where a tenant for life grants a lease under a power in the deed creating his estate, for the estate of the lesses in such a case is derived out of the inheritance, and not out of the particular estate, he being in under the deed creating the power; and therefore on the extinguishment of the particular estate, by surrender or otherwise, the reversioner or remainder-man has the same remedy by distress as the tenant for life had.

It must be observed that in all the above cases when the rent itself for the future is extinguished. whether it be by the expiration of the tenancy (saving the right given by the statutes 8 Anne, c. 14, or 3 & 4 Will. 4, c. 42,) or by the determination or merger of the reversion, or by whatever other means the extinction of the rent is effected, and whether it be rent-service or rent-charge, the remedy by distress, even for arrears due at the time, ceases with the continuance of the rent, and is utterly taken away.3

We have already seen that the right to distrain

By the nonperformance of may happen to be prevented or taken away by the a condition precedent.

becoming payable; as in the recent case cited in the first section of the last chapter.4 Where a lord claims a right to distrain in respect of his seignory, whether by title of escheat or other-

non-performance of a condition precedent to the rent

Pending a plea to try the seignory.

² See Threr v. Barton, Moore, 94; also Smith v. Day, 2 M. & W. 684; ante, p. 26, n. 7. Thorn v. Woollcombe, 3 B. & Ad. 586.

³ Co Lit. 162, b.; Ognel's case, 4 Co. Rep. 50, b.;

Dixon v. Harrison, Vaugh. 40; Ashmore v. Hardy, 7 C. & P. 501; Tutter v. Fryer, Winch. 7: Lumley on Rentcharges, 384.

⁴ Mechelen v. Wallace, 7 A. & E. 54, n.; ante, p. 108.

, it has been always held that pending a plea to he seignory he could not make a distress for the nt's rent. So that, if the lord distrained for , and the tenant replevied, and to the avowry of lord pleaded hors de son fee, and pending that the lord distrained for rent subsequently acd; it was held, that the tenant was entitled to vrit of recaption; because it was fit he should not gain distrained until the seignory of the lord been tried in the first plea; but if he had pleaded, errere, or any other plea admitting the tenure, lord would have been entitled to make a second

he right of distress for rent, of whatever kind, By agreemen be taken away or suspended by an express or not to distrain ied agreement not to distrain. Thus, where in eatage, amongst other things, belonging to enant of a farm, was about to be sold by a credimder a bill of sale, but before the sale took place andlord put in a distress for rent; whereupon it agreed that the sale by the creditor should pro-, and the landlord be paid his arrears out of the eeds of the eatage and other things; the court that a contract by the landlord might be inferred to distrain the cattle of a purchaser put on the to consume the eatage. So where a landlord's ver allowed a tenant every year for seventeen to make a deduction in respect of a payment md-tax greater than the laudlord was liable to the landlord knowing or having the means of ring all the facts, it was held that the latter could afterwards distrain for the sums erroneously ald, though the receipt given every year showed amount really paid, and the amount deducted.6 te manner where double rent has accrued due on

ro. Dist. pl. 14; F. N. B.

Iorsford v. Webster, 1 . & R. 696; s.c. 5 Tyr. Parke, B., dissentiente. lso Fowkes v. Joyce, 3

Lev. 260; s. c. 2 Vent. 50; and 2 Saund. 290, n. (7); ante, p. 100. 6 Bramston v. Robins, 4

Bing. 11; s. c. 12 Moore, 68,

the tenant's holding over after notice, under tute 11 Geo. 2, c. 19, it seems that the accept single rent would operate as a waiver of the distrain for more.7 But if the landlord's ag to forego his remedy in any instance be de on the performance of a condition precedent other party, the condition must be strictly ful order to avoid the distress. Thus, in a case wh plaintiff being about to take an apartment of fendant's tenant, was promised by the defend: his goods should not be taken so long as he 1 rent of the apartment to the tenant; and subse to his having paid part, and tendered the residu arrears, the defendant, who had no notice of the distrained his goods for rent due from the ter was held that the defendant's right to distr not barred.8

Effect of an interest on rent.

Of taking a security for the rent.

Under this head, in reference to implied agree agreement for not to distrain, it must be observed, that as ment to take interest on rent in arrear doe itself necessarily take away or suspend the redistress.9

> Nor does the taking a security for the re bond, bill of exchange, or promissory note, or take away the right to distrain; for the 1 debt of a higher nature, and the acceptai security of an unequal degree will not of its necessary legal consequence, and without a agreement between the parties to that effect. as an extinguishment or suspension of the but payment of the bond, bill, or note would extinguishment of it; or even a judgment of

⁷ Doe d. Cheney v. Batten, Cowp. 243. This was a case under the statute 4 Geo. 2, c. 28, but the principle seems to apply equally in both Cases

⁸ Welsh v. Rose, 6 Bing. 638; s. c. 4 Moo. & P. 484.

⁹ Sherry v. Prestor Rep. 245.

Roll. Abr. tit. Ex. ment; Davis v. Gyd. E. 625; s. c. 4 N. & Drake v. Mitchell, 251'; Palfrey v. Ł Price, 572.

bond; although the landlord's right to disevives on an execution being waived.8 ere a tenant, on whom his landlord had dis-I for rent, in order to release his goods gave a sory note for the amount jointly with another , and the landlord made a subsequent distress him for arrears of rent accrued due after the to which the note referred, it was held that oduce of the sale of such latter distress must lied in discharge of the note; and that the rd cannot apply it in discharge of the subserent, and then sue the person who joined in the note for the amount of the former rent.4 istress for arrears of rent is not taken away by Effect of a t that since they became due other arrears have previous dis-

d and have been distrained for: 5 provided the tress for rent s be several and distinct, falling due at different accrued due subsequently for which two separate distresses might justly to that prede.6 we have already seen, that as various distresses trained for.

xatious, where the rent intended to be made Of a previous bject of a distress is entire, the whole amount distress for the ust be distrained for at once, if sufficient goods e found upon the premises; and that if an enm be split, and part of it distrained for at one and part of it at another, the second seizure e illegal.⁷ Yet, though such previous distress ave the effect of making the distrainer liable to ion for the second taking, it seems that whilst nt really continues in arrear and unsatisfied nant cannot successfully replevy the second disor plead the first seizure in bar to an avowry For to a cognizance for rent in nt thereon.

rris v. Shipway, and . Clifton (Lady), Bull. 82, 7th ed. wen v. Mihil, 1 Ld. Ifrey v. Baker, 3 Price.

lmer v. Strange, 1 Lev. c. Sid. 44; 1 Keb. 95;

Fountain v. Guales, Comb. 59; Gambrell v. Falmouth (Earl, 4 A. & E. 73; ante, p. 110.

⁶ See *ante*, pp. 109, 110. 7 Wallis v. Saville, 2 Lutw. 1536; Hutchins v. Chambers, 1 Burr. 589; Anon. Moore, 7; ante, p. 111.

In the present chapter, it only remains to consider the very important question of the effect of a tender of the rent.

Upon this head it is distinctly laid down—that tender upon the land before the distress makes the distress wrongful; tender after the distress, and before the impounding, makes the detainer, and not the taking, wrongful; but tender after the impounding makes neither the one nor the other wrongful, for then it comes too late, because then the cause is put to the trial of the law, to be there determined.7

So that, although the landlord refuse to take the rent, a tender of it at the proper time and place8 will prevent a distress, that being all the tenant is bound to do. The tender should be made to the landlord himself: it need not be made to the broker or bailiff who distrains; and a detainer by the latter, after tender made to the landlord, would be wrongful. In some cases, indeed, a tender to the bailiff distraining might be insufficient; for a person may have been authorized to distrain, who could not be trusted to receive the rent and costs; but where an agency for such purposes exists, a tender to the party actually distraining is valid.2

Thus, if a tenant tender his rent after a distress has been made, but before it has been impounded or removed, he may bring an action of trespass, in the event of a subsequent removal.3 As to what is the impounding, in order to decide when a tender in this instance may be made in time, we must refer to our previous observations on the subject.⁴ In one case. where cattle distrained (damage-feasant) had been

⁷ Six Carpenters' case, 8 Co. Rep. 147, a; 2 Inst. 107; Firth v. Purvis, 5 T. R. 432; Pilkington's case, 5 Co. Rep. 76; Evans v. Elliott, 5 A. & E. 142; Vertue v. Beasley, 1 M. & Rob. 21.

⁸ As to what amounts to a good tender generally, and how it should be made, see Chitty, jun, on Contracts, p.

^{620,} et seq. 2nd ed.

⁹ Smith v. Goodwin, 4 B.& Ad. 413; s. c. 1 N. & M. 371.

¹ Pilkington's case, 5 Co. Rep. 76; s. c. Cro. Eliz. 813. ² Browne v. Powell, 4 Bing. 230; s. c. 12 Moore, 454.

³ Vertue v. Beasley, 1 Mood. & R. 21. As to the remedies in such case, see post p. 180.

⁴ See ante, pp. 142, 146.

tinto a private pound, but the distrainer admitted that were about to be forwarded to the public pound. was held that a tender of satisfaction, made whilst wwere in the private pound, was not too late.⁵ In ther case, a landlord's agent distrained cattle in eld, counted them, took a note of the particulars. I went away; on the next day he left a notice, ting that he had distrained the cattle thereunderntioned, and had impounded them on the preies; here a tender subsequently was held too late.6 But as a tender made subsequently to the impoundcomes too late, it has been decided that no action l lie for detaining a distress after such a tender.7 remedy of the owner of the distress in such case, he distrainer refuse to accept of reasonable amends dered after the impounding, is thus stated; -after has replevied, and the law has determined it, the avower has return irreplevisable, yet, if the ntiff make him a sufficient tender, he may have action of detinue after; or he may, upon satision made in court, have a writ for the redelivery of goods.8

n the case of a distress of growing crops, under statute 11 Geo. 2, c. 19, it will be remembered: the ninth section expressly provides, that if at time before such crops are ripe, and cut, cured, rathered, the arrears of rent and costs of the dissare paid, then upon such payment, or lawful ler thereof actually made, the distress shall cease, the things shall be delivered up to the tenant.

Where the rent has been once duly tendered presly to a distress, the person entitled to it cannot rwards distrain for it, without a subsequent ded on his part, and a refusal on the part of the nt. But as the tender supposes a continuing iness to pay, if the landlord make a subsequent

Browne v. Powell, 4 Bing. s. c. 12 Moo. 454. Thomas v. Harries, 1 Sc. .524. Inscombev. Shore, 1 Camp. s. c. 1 Taunt. 261; Sher. Jumes, 1 Bing. 341.

⁸ Six Carpenters' case, 8 Co. Rep. 147, a; Gilb. Dist. 61; 2 Inst. 107; 5 Co. Rep. 76, a; Roberts v. Young, 1 Brownl. 173; Vaspor v. Edwards, 12 Mod. 661; Allen v. Bayley, 2 Lutw. 1596.

demand at any time, and the arrears be not paid, he may distrain. So without any other subsequent demand, the landlord may maintain an action (itself a demand) of debt or covenant, as the case may be, for the rent tendered, but he will not recover damages or costs for the non-payment.

CHAPTER VI.

OF A WRONGFUL, IBREGULAR, AND EXCESSIVE DISTRESS,

AND OF THE SEVERAL REMEDIES.

Sect. 1. Of a wrongful distress, and of the several remedies.

Sect. 2. Of an irregular distress, and of the several remedies.

Sect. 3. Of an excessive distress, and of the several remedies.

A PARTY distraining may be guilty of making a wholly wrongful distress; or of conducting it in an irregular manner; or of taking an excessive distress.

At common law, indeed, there was little or no distinction between the first two cases, in consequence of the rule already stated, that any irregularity committed in the proceedings in distress rendered the party distraining a trespasser ab initio; but as regards the subject of present consideration, a distress for rent, this has been totally changed by the statute 11 Geo. 2, c. 19, which established the more equitable principle, that the person aggrieved by any irregularity shall be entitled only to recover damages proportioned to the injury sustained. The terms of the enactment are, that where any distress shall be made

Granley v. Kingswell, Hob. 207; Horne v. Lewin, Ld. Raym. 639, 641; Maund's case, 7 Co. Rep. 28; Pimm v.

Grevill, 6 Esp. 95; ante, p. 119.

⁴ Anon. 1Vent. 21.

¹ Ante, p. 13.

for any kind of rent justly due, and any irregularity or unlawful act shall be afterwards done by the party or parties distraining, or by his, her, or their agents, the distress itself shall not be therefore deemed to be unlawful, nor the party or parties making it be deemed a trespasser or trespassers ab initio; but the party or parties aggrieved by such unlawful act or irregularity shall or may recover full satisfaction for the special damage he, she, or they shall have sustained thereby, and no more, in an action of trespass, or on the case, at the election of the plaintiff or plaintiffs: provided always, that where the plaintiff or plaintiffs shall recover in such action, he, she, or they shall be paid his, her, or their full costs of suit, and have all the like remedies for the same as in other cases of costs.

So, making an excessive distress is, as it were, a species of wrongful distress pro tanto, or rather a kind of irregularity in the conduct of it: but in consequence of the different remedies given in the various cases by the common law, and by statute, it is necessary at present to consider severally the nature of a wrongful, of an irregular, and of an excessive distress, and the remedies respectively provided for them.

SECTION I.

Of a wrongful distress, and of the several remedies.

A distress, then, may be altogether wrongful—as, Of a wrongfu where it is made for something else than for rent; ² distress. or for rent, when none is in fact due, or after a sufficient tender; ³ or when it is made in the night-time; ⁴ or where it is wholly taken in the highway; ⁵ and in

That is to say, for some debt or claim (not being any of the other subjects of distress treated of hereafter), as e. g., a sum reserved not in effect amounting to a rent. See as to what is necessary to

constitute a rent, ante, p. 19. et seq.

⁸ Co. Lit. 160, 161.

⁴ Co. Lit. 142, a; Aldenburgh v. Peaple, 6 C. & P. 212; ante, p. 119.

⁵ Id.; Smith v. Shepheard,

all such instances the distrainer is a trespasser ab So he is nearly in the same position in effect where after the seizure, and before the impounding, the tenant tenders a sufficient satisfaction for the arrears due, and the charges of the distress; -for in this latter case, although the distrainer may have made a lawful entry and seizure originally, yet the unlawful detention operating as a new taking, he becomes an absolute trespasser from the time of the tender.6

medies for a ongful dis-:88.

' rescue.

There are several remedies open to the party in-

jured by a wrongful distress.

The most obvious and summary is that of rescue, a remedy by which the law permits the owner of the goods himself to redress the wrong committed by retaking them out of the hands of the trespasser.8 This remedy can be exercised only whilst the goods are in the possession of the distrainer, that is to say, before they are impounded,9 for after that they are in the possession of the law. It must be remembered, too, that where the owner of the goods distrained makes a rescue of them, he makes it at his own peril, for if it afterwards appear that the distress was in fact lawful, he will be liable to an action for an unlawful rescue; and, therefore, if there be any doubt as to the legality of the distress, it is most prudent not to attempt a rescue, but to adopt a less dangerous though more tedious remedy.

y action.

The remedies by action are either by replevin, or by trespass at common law, or in some instances by trespass or case under particular statutes, or by trover,

or, perhaps, by detinue.

f replevin.

Thus, replevin may be brought to recover damages for the unlawful taking, the validity of which it is consequently an effectual mode of contesting. This form of action has this advantage—that it may be

Cro. Eliz. 710; 17 Edw. 3, 1; 43 Edw. 3, 40.

⁶ Bevil's case, 4 Co. Rep. 11, b; Frith v. Purvis, 5 T. R. 433; 2 Roll. 431, 1.5; F. N. B. 19 G.; ante, p. 176, and

the authorities there cited. ⁷ See post, p. 206.

⁸ Co. Lit. 47, b. 160, b. 9 Alwayes v. Broome, 2 Lutw. 1262.

See post 209; Brad. 252.

by a redelivery of the pledges, or things , to the owner by the sheriff or his deputy; ner's giving security to try the right of the ind to restore the goods if the right be adainst him.2 By these means the owner is venienced by the loss or detention of his ilst the right is being tried; and the disnterest is sufficiently protected by the secuto the sheriff. Care must of course be eplevy before the sale.

on of trespass at common law, either quere Of trespass at egit or de bonis asportatis, is another of the common law. by action which may be adopted to recover for the wrong committed by a distress wholly

the case of a distress made and sold for Trespass or ice where none is due, the owner of the case under the trained has now a more complete remedy by statute 2 Will. an he formerly had by the common law. 5, for a distress tatute 2 Will. & M., sess. 1, c. 5, enacts, where no rent ase any distress and sale shall be made by was due. colour of that act for rent pretended to be and due, where in truth none is in arrear or the owner of such goods so distrained and executors or administrators may, by action s or upon the case to be brought against the distraining or his executors or administrators, suble the value of the goods so distrained and ther with full costs of suit. From the terms of eems that a sale must take place, in order to the offence which it is intended to remedy, it must be questionable whether an action tatute will lie. A formal statement of the

e, p. 7, n. 5; and

be perceived that ks apply to repleletinuit, the usual action. Replevin et has long fallen e, and is never dess the distrainer has removed the goods, so that the sheriff cannot get at them to make replevin. 2 Sell. Prac. 241. As to replevin, see post; Wilkinson on Rep.; Bac. Abr. tit. Replevin; Com. Dig. Replevin; Har. Woodf. Land. & T. 694, 3rd edit.

demise is not required in the declaration; it is sufficient to say that the goods were taken in the name of a distress.

Trespass under the statute of Marlebridge for taking a distress in the highway or street.

Where the distress is wrongful because taken in the highway, if the party grieved seek any further remedy than that of rescue, it must be by action on the statute of Marlebridge, which enacts that no man shall take distresses in the king's highway, nor in the common street, but only the king or his officers, having special authority to do the same. And he must, it is said, take advantage of this statute in the first instance, as he cannot avail himself of it by pleading it in bar to an avowry.

The remedy for taking a distress out of the fee is likewise under the statute of Marlebridge; or, in the case of cattle so taken, under the statute of West-

minster the first.

There was also a remedy under the Articuli cleri, relating only to ecclesiastical persons, for a distress wrongfully taken in the highway or in ancient glebes. But this may be considered as wholly obsolete.

By action of trover, or detinue. The other forms of action which we have mentioned as remedies open to the party grieved by a wrongful distress, are an action of trover to recover the value of the goods taken; and, in some cases, an action of detinue to recover the specific goods themselves. It has been held that the action of trover, like that of trespass, may be maintained after the party grieved, should he think proper so to do, has redeemed his goods by paying the sum demanded, and has obtained possession of them. We have already seen when

³ Salter v. Brunsden, 4 Mod.

⁴ Stat. Marlb. 52 Hen. 3,

^{5 2} Inst. 131; because, it is said, the king would lose his fine. It must be questionable whether this reason alone could support such a restriction at the present day.

<sup>Art. cler. 9 Edw. 2, c. 9;
Inst. 627; F. N. B. 173,
174; Brad. 257.</sup>

 ⁷ Shipwick v. Blanchard, 6
 T. R. 298; Branscomb v. Bridges, 1 B. & C. 145.

⁸ Shipwick v. Blanchard, 6 T. R. 298; Bishop v. Montague, Cro. Eliz. 824; s. c. Cro. Jac. 50; Smith v. Goodwin, 4 B. & Ad. 413; s. c. 1 N. & M. 371. This last case is not an authority for the position that where a distress is altogether wrongful, an action on the case is an admissible remedy: (ex-

lies after a return irreplevisable. And it a proper form of remedy where a distress taken is wrongfully detained after a tender eviously to the impounding. But the right tain it, by waiving the trespass, where a disaltogether wrongful, does not appear to be ed by any express authority; and though less adopted in practice under such circumit is perhaps a less eligible form of action see which we have hitherto mentioned. les the above forms of action, it is said that an ior money had and received is a proper mode

er the statute 2 Will.
ss. 1, c. 5, see supra;
me distinct irregulaexcess, see infra;
e v. Shore, 1 Camp.
don v. Hooper, Cowp.
riff v. James, 1 Bing.
se real ground of that
he decision seems to
tated by Parke and
Js., that the seventh
the declaration was
mal count in trover,
cient after verdict.
, p. 177.

lw. N. P. 1213, 8th , 9th ed.; ante, p. 176. old doctrine certainly have been that detinot maintainable in tortious takings; 6); Bro. Abr. Detinue, 3; 3 Bl. Com. 152; Dig. Detinue, (D); . Detinue (B, 2), pl. uss (Y), pl. 12; upon ning, it is said, that respass the property laintiff was divested, equently that the prothe things detained vested in him at the he commencement of a. 6 Hen. 7, 9, per . J.; 1 Chit. Pl. 123, A sufficient answer

to this, if any be necessary at the present day, may be found in the cases admitting the action of trover where the distress was tortious. But in reference to detinue, the gist of which is a wrongful detainer, it may also be observed, that where the distress is altogether wrongful, as the owner of the goods may protect himself by replevin, the detainer by the distrainer seems rather of a permissive than of a wrongful character, (see the next note). And. from the language of the court in Lindon v. Hooper, Cowp. 414, and Anscombe v. Shore, 1 Cowp. 285, a plaintiff grieved by a wrongful distress may be supposed to labour under a prescriptive restriction to the ancient and approved remedies by action of replevin or trespass. The objects of detinue and replevin being so nearly similar, perhaps the adoption of the former might be considered as arising from an evident design to deprive the defendant of the advantages given him by the latter form of action. But quære.

of remedy where goods seized under a wrong tress have been converted into money by t trainer.³

We may observe in this place, that wherever tress has been wrongfully made, so that the dishas committed a trespass ab initio, still if he beginning of any excess in the seizure, or of any irrestafterwards in the conduct of the distress, the grieved is not limited in his choice of remed

3 Har. Woodf, L. & T. 342. 3rd ed.; Leigh's Law of N. P. 815. But the admissibility of such an action seems to be open to considerable doubt. There are two cases in which we may suppose it to be brought; the one, where the goods have been sold by the distrainer to a third party; the other, where they have been redeemed by the plaintiff himself. In the former case, it has the doctrine laid down in Lindon v. Hooper, and Anscombe v. Shore against it: and there is no instance in the books of its ever having been adopted; (for the observations of the court in Graham v. Tate, 1 M. & Sel. 609, show that to have been a case of redemption by the tenant, though it would appear otherwise from the earlier part of the report): besides, considering the loss at which things are generally disposed of at a broker's sale, it is scarcely possible that this action should ever be selected in preference to trespass or trover, where the full value of the goods, or more, might be recovered. In the case of the plaintiff himself having redeemed the goods, (the only instance in which it is likely to be adopted), it seems clear upon the general principles

of the admissibility of tion for money had ceived, and upon th rity of Lindon v. Cowp. 414, and A Hall, 1 Esp. 84, tha tion would not lie. Skeate v. Beale, 3 P. ! The first of these case: one of a distress of c mage-feasant, appears to every species of di common law, and r ble; and in the lat payment was not to voluntary because n fore an actual distress v. Carter, 5 Bing. 4 p. 113. A payment in of a wrongful distreto be voluntary bec tenant might protect by replevin. In the Graham v. Tate, 1 M 609, which appears port this form of action was a count for mone and certainly the held by Lord Ellen C. J., in that case ca supported. Neither L Hooper or Knibbs v. 1 pears to have been Graham v. Tate.

In Feltham v. Terry 207, Cowp. 419, the was under a justice's v so that perhaps no lay; and the convict been quashed. y, but may elect to affirm the taking, and 1 case for such excess or subsequent irre-

remains in this section to speak of a parti- Of the remedy ies of wrongful distress for which an espe- by writ of reof remedy is provided,—that is to sav, the caption in case g a second time for the same rent, the same of a wrongful distress by takcattle, they having been replevied, and re- ing the same the owner by the sheriff, and the action of goods for the being still pending.5 For this injury the same rent, the things so taken, whether he be the pending an a stranger, may have a writ of recaption. plevin. men's cattle be distrained for a rent, and s the cattle of one of them be taken again me cause he may have such writ. But if of two different persons be at separate rained for the same rent, the owner of the stress cannot have this writ, because his re not been twice taken. It seems, how-; it lies even where different cattle of the ant are taken for the same cause as the stress.⁶ If the defendant be convicted in of recaption he will be fined to the crown; y the second caption the defendant takes self to determine the legality of the first, at very point is under the consideration of in which the replevin is depending: for if ss were lawful in the first instance, he would turn of it by law, and therefore the second unreasonable; and if the first were unlawmore so is the second, being for the same that the recaption lies even where the cause t caption is just. If the second distress be the lord himself, or by his bailiffs by his

iccrued, see ante,

l v. Bird, 10 Bing. omb v. Bridges, 1 15; s. c. 3 Stark. lso Smith v. Good-; Ad. 413; s. c. 1 cause of the diserent, as rent sub-

p. 175, (unless pending a plea to try the seignory, ante, p. 171), or damage-feasant, &c., of course the second distress is lawful.

⁶ F. N. B. 71.

⁷ Gilb. Rep. by Impey, 224; F. N. B. 71. (E); Brad. 263.

command, or if made by his bailiff withou mand, but the lord afterwards assent to must be brought against the lord himse facit per alium facit per se, and omnis ratih dato priori æquiparatur: but if made by without the previous or subsequent conc the lord, an action of trespass, and not a caption, lies against the former.8 The wr tion lies for the tenant even before avow the lord in the first replevin, for otherw medy would not be adequate, because the harass the tenant by several distresses. lord by the rules of the court could be co But then the tenant must in his on the recaption aver that the second d taken for the same cause as the first, of would fail in making out to the court his writ of recaption, and consequently could the lord for taking the second distress. lies as well where the plea is depend county-court before the sheriff, as where it ing before the justices of record.1 The must not avow as in a replevin, but justify pass; for he must be looked upon as a unless he can justify the taking for anot The damages to be recovered are not for detaining the plaintiff's cattle or goods, b mages for the defendant's contempt again If the writ of replevin be abated, then the caption also abates: and if the recaption be the defendant is entitled to a return of the

What is sufficient to vest a right of action for a wrongful distress, and how it may be destroyed.

In order to determine when a party is maintain an action for a wrongful distress, to be considered whether a taking, supp be wrongful, has been really made. ready noticed some of the cases as to wh

⁸ F. N. B., 71.

⁹ Gilb. Replev. by Impey, 227; F. N. B. 72 (A); Brad. 264.

¹ F. N. B. 72. G.

² Id. 72. B.; 3 1 Roll. 320

Com. Dig. (3 K. 4 F. N. B. 7

n. (a) Id.; Brad

to a distress. 5 Thus we have seen that where a land. lord, on hearing his tenant disputing with a stranger about removing a lathe, entered the house, and laying his hand on the machine, said that neither it, or any the other things, should go off the premises till rent was paid, a distress was held to be sufficiently made 6 So where a landlord's agent walked round be premises, without touching anything, and left a written notice that he had distrained and left there certain goods specified, which would be appraised sold in due course in default of replevin or payment of the rent claimed:7—and where a broker want to the tenant's house and pressed for payment rent alleged to be due, and 31. 3s. for expenses of y, but touched nothing, and made no inventory, hereupon the tenant paid him the rent and expenses Mer protest, and he withdrew: in both these was decided that the landlords could not say e had been no distress. But where the defenentered the plaintiff's house by mistake, d said he had come to make a distress, and began ting an inventory, but, finding out his mistake, the house without removing any of the goods, it s held that what he had done did not amount to king a distress.9

The exercise of a right of action and a claim to mages are not prevented by the fact that whilst distrainer remained in possession the plaintiff if free use of his goods; and the latter was held itled to recover on proof of the seizure of his ds, and the keeping of a man in possession, hout showing any further damage. Neither is the ht of action waived by entering into an agreent with the distrainer as to the sale of the goods; a right of action once vested can be destroyed

Ante, p. 132.

Wood v. Nunn, 5 Bing.
s. c. 2 M. & P. 27.

Swann v. Falmouth (Earl),
& C. 456; s. c. 2 M. &
534.

Hutchins v. Scott, 2 M. &

W. 809; and see Shipwick v. Blanchard, 6 T. R. 298.

⁹ Spice v. Webb, MSS.;
Q. B. Mich. Term, 1838.

¹ Baylis v. Fisher, 7 Bing.
153; s. c. 4 M. & P. 790.

only by a release under seal, or by the receipt of something in satisfaction for the wrong done.²

Against whom an action for a wrongful distress may be brought.

Where an action is brought for a wrongful distress, care must be taken not to select, or even to include the landlord as defendant without sufficient evidence to charge him as having authorized the trespass. Where a warrant of distress was produced by a plaintiff, purporting to be issued by the solicitors d the landlords of certain property, the writing being that of a junior partner of the firm, and it was proved that the solicitors had on previous occasions issued distress warrants in respect of other property of the landlords; this was held not to be sufficient evidence of an authority by the landlords to distrain.⁸ And in another case, where the only evidence affecting the landlord was, that all the defendants appeared by the same attorney; that the attorney had given the plaintiff notice to produce "the notice of distress for rent due to Mr. K." (the name of the landlord), and that the managing clerk of an attorney, when he served it, offered 101. to settle the action; this was held not even to be evidence to go to the jury as against the landlord, and the judge directed his acquittal.4

Notice of action.

Where an action of trespass was brought against a person who had made a wrongful distress for two causes, as to one of which he was by statute entitled to notice of action, which had not been given, the action was held to be maintainable in respect of the other cause.⁵

SECTION II.

Of an irregular Distress, and of the several remedies.

Of an irregular distress.

Where a right to distrain clearly exists, and the party exercising it is not, consequently, guilty of

² Willoughby v. Backhouse, 2 B. & C. 821; s. c. 4 D. & Ryl. 539; Sells v. Hoare, 1 Bing. 401.

³ Jones v. Buckley, MSS.;

Q.B. sittings after Hil.T.1838.

4 Crabb v. Killick, 6 C. & P.
216.

⁵ Lamont v. Southall, 5 M.

[&]amp; W. 416; s. c. 7 Dowl. 469.

a wrongful distress, he may still be guilty of ing it in an irregular manner. We have. r, seen above that since the statute 11 Geo. 2. where any distress is made for any rent justly d any irregularity or unlawful act, is afterlone by the party distraining, or his agent, tress is not now, as at common law, to be unlawful, nor the distrainer a trespasser ab but that by the nineteenth section of that act ty grieved may recover satisfaction for the damage in an action of trespass, or on the t the election of the plaintiff, with full costs :1 the twentieth section providing, that no or tenants, lessee or lessees, shall recover in ion for any such unlawful act or irregularity. er of amends be made by the party or parties ing, his, her, or their agent or agents, bech action brought.

remedies, therefore, applicable in case of an ir distress are different from those where the is altogether wrongful.

igh, indeed, if the irregularity be in the naa distress wrongful as to a part,—as if in a lawful distress the distrainer take things ely privileged at common law or by statute, or of the plough, or implements of trade, when re other distrainable goods on the premises,² ne remedies are available in respect of such rity or partial wrong as in respect of the where the whole proceeding is wrongful. to say, in the instances supposed, the things ed might be rescued, or replevied, or an of trover, or of trespass might be maintained ect of them³. So if things be removed which

^{2,} p. 13, 178, 179.
L. B. 88; Hutchins bers, 1 Bur. 579;
Falkner, 4 T. R. rown v. Shevil, 2 A. 8; s. c. 4 N. & M. rd v. Ventom, Peake's 26.

³ Except, indeed, in the case of a distress of beasts of the plough where the only remedy by action is said to be under the 51 Hen. 3, stat. 4, See *infra*, p. 193, and n. 1.

Of the Remedies for an irregular

were not taken under the distress in the first instance nor included in the inventory, because they were not discovered at the time, the distrainer is an ab bsolute trespasser as to such things.4 But where the complained of is a mere irregularity,—as not preimpounding the distress, using or destroying it it, sell ing too soon, without notice, or without due app ment, remaining on the premises an unreasonab beyond the five days;—in these, and all such the party grieved has now only the remedies tioned in the statute by action of trespass, or on the case at his election. And the true cor tion of the clause, limiting him to those reme held to be, that his election of the form of must not be capricious, but according to the law, and with reference to the nature of the Inegal larity complained of; the chief object of the statute appearing to have been to limit the claim to di mages for the specific injury received. Thus, where the irregularity is of a forcible nature, as if the landlord expel the tenant from the premises, or remain therein an unreasonable time, trespass is the proper remedy; but where the irregularity is a mere onission, or a wrong not in the nature of a trespass, a lotte omitting to appraise the goods before selling them case must be adopted, and trespass will not lie.

It is not necessary to attempt to specify the me merous cases of irregularity which may occur; they may be easily collected from the practical directions so fully given above as to the manner of conducting a distress. But it is desirable to advert to the decisions which are extant on such instances of irregularities as have actually occurred, and have come under the cognizance of the courts.

It has been held, then, that since the above statute trover will not lie for goods distrained where they

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⁴ Bishop v. Bryant, 6 C. & P. 484; Sims v. Tuffs, Id. 207; ante, p. 161.

⁵ Etherton v. Popplewell, 1 East, 139.

⁶ Winterbourne v. Morgan, 11 East, 395. 7 Messing v. Kemble, 1

Camp. 115.

ely irregularly sold;8 nor in the case of after the service of an irregular notice thout removing the goods off the preindeed, for any mere irregularity, necessarily supposes a conversion by a wrongful. But whenever, as in these irregularity complained of is subjectaction on the case it is prudent to add ver to the declaration, if there be any ntend that the distress was wholly l it has been held that under such cire plaintiff may, at the trial, without notice to the defendant, abandon the or the irregularity, and proceed on the ... In an action on the case for selling ed without an appraisement, the meamages is the value of the goods minus id in such a case, if the sum produced the goods be less than the fair value he may recover the difference, without of special damage.³ In an action on ot selling for the best price, a plaintiff ed to prove that the goods were im-., and that they were allowed to stand Of course, reasonable care and dilie used to obtain the best price; and adlord is not justified in parting with a price manifestly inadequate to their h no better be offered at the time; but such a price be offered, to defer the ry to the instance of a sheriff who has n execution.5 The price at which the

ing, 1 Hen.

Vinter, 2 M.
this case the
vas illegal,
an infant,
one of the
lecision that
version.
rown, 4 M. &

Ry. 639.

² Biggins v. Goode, 2 C. & J. 364; s. c. 2 Tyrw. 447.

³ Knotts v. Curtis, 5 C. &

⁴ Poynter v. Buckley, 5 C & P. 512.

⁵ Keightly v. Birch, 3 Camp. 521; Barnard v. Leigh, 1 Stark. 43.

goods have been appraised will be presumed the best price, until the contrary be shown action on the case lies against the person dist under the 57 Geo. 3, c. 93, s. 6, if he neglect a copy of his costs and charges signed by him person or persons on whose goods and chatt distress shall be levied. But if a landlord personally interfere, he is not liable for such 1 in his broker; the broker himself in such case the only person answerable. An action on the is also maintainable against the distrainer und 2 Will. & Mary, c. 5, s. 2, if he omit to lea overplus of the proceeds of a distress with the under-sheriff or constable.8 This action, acc to the terms of the statute, is at the suit of the of the goods sold. It seems that the owner also demand the overplus of the landlord and l before they have paid it to the sheriff, and br sumpsit for money had and received. It ha held that the reasonableness of the distr charges may be questioned on a count for not 1 the overplus with the sheriff, on the groun the overplus ordered to be left with him mea overplus after payment of the rent and reas charges. Where the plaintiff had received fro broker the balance remaining after payment rent due and charges demanded, making no ob at the time as to their reasonableness, it was h be a question for the jury whether he accepted balance in satisfaction; and if not, whether in fact, sufficient to satisfy the real balance; b it was not correct to lay it down as matter (that such payment and receipt substantially s the requisitions of the statute.² An action sumpsit for money had and received also lies a a distrainer taking excessive charges, even t

<sup>Walter v. Rumbal, 4 Mod.
390; Com. Dig. Dist. (D. 8.)
Hart v. Leach, 1 M. & W.</sup>

^{560.}

⁸ See ante, p. 160.

⁹ Anon. Lofft, 201;

son v. Routh, 2 B. & (

1 Lyon v. Tomkies,

W. 603.

^{3 14}

^{* 1}d.

int had obtained time in order to prevent a We have seen that the amount of the diss charges, where the rent due does not 201., is regulated by the statute 57 Geo. 3, and that that statute is not applicable when tress is for a greater amount, though the are appraised at less.3 Where the rent ex-201. the reasonableness of the charges is a 1 for a jury.6 It has been decided that no in the case under the statute 2 Will. & Marv. against a landlord for selling unripe growns. seized as a distress, within five days or a ble time after the seizere, such sale being void.7 But in another case the remedy for grievance was held to be under the 11 Geo. 2. 1. 8, by an action of trespass or case for the damage arising from the irregularity and no

In the last-mentioned form of action, the d was held entitled to deduct the rent due to om the difference between the price which have been obtained had the sale been regular, it which was obtained under the irregular sale; where no such difference existed, from the aving been seld for their full value, while the arrear exceeded the produce of that sale, the recovered nominal damages only.9

distraining beasts of the plough or sheep, there are other sufficient and presently availbjects of distress on the premises, the only besides rescue, is said to be by action of

s v. Street, 5 Bing.: 2 M. & P. 96. sp. 162, et seq. d v. Chamberlain, 5 .1049; s. c. 3 N. & M. C. & P. 213. n v. Tombies, 1 M. &

m v. Legh, 3 B. & D. udlove v. Twemlow, 1 326; s.c. 3 Tyr. 260.

¹ Purpirry v. Legingham, 2 Keb. 290. For there was no action at common law. Id. But the rule was precisely the same at common law, it being merely enforced by these statutes; (Co. Lit. 47, b; 2 Inst. 132, 133;, and as the taking is so absolutely wrongful, that rescue may be made, there seems no sufficient reason why trover should not be maintainable.

trespass under the statute De districtione scaccari, 51 Hen. 3, stat. 4, which provides, that no man shall be distrained by his beasts that gain his land, nor by sheep, for any cause, by any persons, so long as the can find another distress or chattel sufficient where they may levy the debt, or that is sufficient for the And this provision is further enforced by Articuli super Chartas, 28 Edw. 1, stat. 3, c. 12. We have seen that the action does not lie if there were sonable ground, as by the appraisement of competer persons, to suppose at the time that the other chattel upon the premises would not be sufficient: and other effects need not first be sold to ascertain fact.8 Beasts of the plough may be taken if there no other distress but growing crops; as the distress is justified in taking what is immediately available without being turned over to that which is made contingent.9 The question of whether or not there any other sufficient distress on the premises is course confined to the very time of making the tress; for it is immaterial whether there were such either before or after. If such irregular " partially wrongful distress has been really made, tenant does not waive his right of action by tendering or paying the arrears distrained for in order to obtain possession of his beasts.2 The declaration need mi allege that there was another reasonable distress to be found, that being matter for the defendant's pleas

For driving a distress out of the county, or impounding it in several places, the remedy is under the statute 1 & 2 Ph. & M. c. 12, s. 1,4 which contact that the person offending shall be liable to forfer to

^{7 &}quot;Taunt come," "so long as," or "whilst," which has been translated "but until."

⁸ Herbert v. Yolland, 2 Chit. Rep. 167; s. c. 6 Price, 3.

Piggott v. Birtles, 1 M. &
 W. 441.

¹ 2 Inst. 133.

² Id.; Hale, note F. N. B. 90.

 ³ Anon. Dyer, 318; \$\frac{81}{24}\$.
 348; Hale, note F. N. B. \$\frac{9}{24}\$.
 See ante, p. 144. Driving

a distress out of the county was also previously forbidden by the statute of Maribridge c. 4; but the remedy at present is under the above as

arty grieved for every such offence a hundred gs, and treble damages; and section 2 enacts, 10 more than fourpence shall be taken for imling any one distress, and if less has been cusy, then less, under a fine of five pounds, besides xcess of the sum taken above fourpence, to be by the offender to the party grieved. We have ly seen, that it has been determined upon the ection of the statute, that the penalty is to be ed to the offence, and not to the persons comgit; and, therefore, that there can be but one y for one distress. Thus, if three persons be ned in driving the distress, only one penalty of ounds, and once treble damages are forfeited; ence being single in its nature, whether comby one person or by several.⁵ This being a statute, it is within the provisions of the statute :. 1, c. 4, and the venue is consequently local; here the action is for driving a distress out of the ed into another county, the venue may be laid er county.6 In order to take advantage of the the party grieved must bring his action n: for where a common law action of trespass ought for taking cattle, in which the defendant d damage-feasant and an impounding within miles, and the plaintiff replied that the iming was in another county, the court held it a ure, because the declaration was founded on nmon law, and the replication on a statute; obthat it being a statutory offence the plaintiff to have brought his action on the statute in the stance.7 And in another case where, on a juson for impounding cattle damage-feasant, it ed that the impounding was in another county, ut held that it did not make the distrainer a tres-

rtridge v. Emson, Noy, rtridge v. Naylor, Cro. 80; Rex v. Clarke,

e v. Davis, 2 Taunt.

^{252;} s. c. 2 Camp. 266; Brad. 271.

Woodcroft v. Thompson, 3
 Lev. 48; Brad. 272.

passer ab initio, although it subjected him to the penalties of the statute; and, therefore, there was a verdict for the defendant.8 Whether or not the plaintiff may recover costs in an action on this statute depends on the section on which the action is founded. The statute of Gloucester, 6 Edw. 1, c. 1, giving costs generally to plaintiffs, does not extend to actions on statutes giving double or treble damages, where single damages are not, independently of such statutes, recoverable; but it does extend to statutes giving the party grievel a certain penalty. If, therefore, the action be on the first section of the statute, the plaintiff cannot be titled to costs; but he may obtain them if his action be on the second section: the penalty given in the first section in addition to the treble damages, dos not alter the rule.9 Of course the plaintiff can now be entitled to costs in any case, only subject to the late act 3 & 4 Vict. c. 24, which we shall presently notice. The second section of the statute 1 & Ph. & M. c. 12, limiting the charge for impounding to fourpence, or less, has been held not to extend to cases where the goods are impounded on the premise by virtue of the statute 11 Geo. 2, c. 19, s. 10.2

Where a distress is made for rent not exceeding 201. we have seen that by the statute 57 Geo. 3, c. 93, s. 2, if the distrainer levies, takes, or receives any greater costs and charges than are mentioned and set down in the schedule of the act, or charges for any thing mentioned in the schedule and not really done, the party grieved has a remedy by application to a justice of the peace.³

In actions for irregular distresses, the correct and proper practice is to make either the landlord alone, where he can be fixed, or the landlord and broker, defendant or defendants, and not to join appraises

⁸ Gimbart v. Pelah, Str. 1272; Brad. 273.

Inst. 289; Anon. Dyer.
 177, b; North v. Wingate,
 Cro. Car. 559; Hull. Costs,
 476.

¹ See post, p. 199.
2 Child v. Chamberlain, 6
C. & P. 213; see ante, p. 165.
3 See the section fully

³ See the section fully stated, ante, p. 162-3.

er persons concerned: 4 and if a plaintiff do m, a judge will oblige him to make out his strict rule, and will not allow questions to be witness who has been cross-examined or a to be called back with a view to fix such apor other persons. As to fixing the landlord, notice a case here, in which, in an action for rular distress, the only evidence affecting him at all the defendants appeared by the same y; that the attorney had given the plaintiffs o produce "the notice of distress for rent due K." (the name of the landlord); and that the ng clerk of the attorney, when he served it, 101. to settle the action: this was held not to ence to go to the jury as against the land-.; and the judge directed his acquittal. And ner case where a warrant of distress was proy the plaintiff, purporting to be issued by the s of the landlords of certain property, the being that of a junior partner of the firm; vas proved that the solicitors had on previous is issued distress-warrants in respect of other y of the landlords; this was held not to be it evidence of an authority by the landlords to We have already mentioned that a poundbeing bound to receive every thing offered to ody, is not answerable, even though the disere altogether wrongful; provided he do not and his public duty, and make himself india party to the trespass.8 And in trover for I wrongfully distrained, it has been held that e act of making an inventory, or drawing a is not sufficient to subject a person to be as a defendant, unless he interfered with the r with the disposition of them.9

¹ v. Chamberlain, 6 :13,484; s. c. 5 B. & 1; 3 N. & M. 520.

b v. Killick, 6 C. &

s v. Buckley. Q. B.

Sittings after Hil. T. 1838. See also Hurry v. Rickman, 1 M. &Rob. 126, ante, p. 130-1. 8 Branding v. Kent, Cowp.

^{476;} s. c. 1 T. R. 62; see ante, p. 146, n. 4.

⁹ Ward v. Haydon, Esp. 552.

A formal statement of the demise in the de is not necessary; it is sufficient to say that t were taken in the name of a distress. 1 tenancy, if described at all, and the name of 1 lord, must be correctly stated, as a variance fatal. 2 So, if the situation of the premises b described, it must be proved as laid; 3 although the state of the situation of the premises b described, it must be proved as laid; 3 although the situation of the premises b described, it must be proved as laid; 3 although the situation of the premises by the situation of th

statement is not required.

The statute 11 Geo. 2, c. 19, s. 21, enacti all actions of trespass or upon the case to be against any person entitled to rents or service kind, or his bailiff or receiver, or other perso ing to any entry by virtue of that act or of upon the premises chargeable with such rent vices, or to any distress or seizure, sale or di any goods thereupon, it shall be lawful for th dant in such actions to plead the general is give the special matter in evidence; and the plaintiff shall be nonsuited, or discontinue hi or have judgment given against him, the d shall have double costs of suit. It has been upon this section that a landlord obtaining i may recover his double costs, though he has specially.4 It has also been held that under of the general issue given by this section, the can justify only for acts done as landlord; ar fore, although he may justify as far as the goes, he cannot justify expulsion under this i also if the goods continue on the premises be five days, he cannot justify, under this issue, the house to remove them afterwards; but plead a license in justification in the latter and liberum tenementum in the former.⁵ does not extend to a distress made off the on goods fraudulently removed. It must no

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¹ Salter v. Brunsden, 4 Mod. 231; Com. Dig. Dist. (D. 9). This was a case under 2 Will. & M. sess. 1, c. 5.

² Ireland v. Johnson, 1 Bing. N. C. 166.

⁸ Harris v. Cooke, 7 Taunt. 539; s. c. 2 Moore, 587.

⁴ Gambrell v. (Earl), 5 A. & E. 4(5 Gilb. Dist. b p. 75.
6 Vaughan v. Dan 257. Eurocaux v. E.

^o Vaughan v. Dan 257; Furneaux v. F Camp. 136; Postma rell, 6 C. & P. 225.

Distress for Rent.

gotten that, by a late rule of court,7 in every case where a defendant pleads the general issue, intending to give the special matter in evidence, by virtue of an act of parliament, he must insert the words "by statute" in the margin of such plea, in order to be allowed to avail himself of the act.

The defendant will not now be allowed to plead to a count in trover not guilty, and also a justification

under a right of distress.8

Notwithstanding that the statute 11 Geo. 2, c. 19, 1. 19, entitles the successful plaintiff in an action under the statute to full costs of suit, it has been held that a judge's certificate under the 43 Eliz. c. 6, is

mficient to deprive him of costs.9

And now, by the late act 3 & 4 Vict. c. 24, it is wevided, that where a plaintiff in any action of trespass, or trespass on the case, shall recover a verdict for less damages than 40s., he shall not be entitled to my costs whatever, unless the judge shall immedistely afterwards certify on the back of the record, or writ of trial, or of inquiry, that the action was really brought to try a right besides the mere right to recover damages for the trespass or grievance for which Expedience the action was brought, or that the trespass or griev- a tender of ence was wilful and malicious.

amends in

In concluding this section on the remedies for an cases of in irregular distress, it is obvious to impress upon a distrainer who has been guilty of any irregularity in the course of his proceedings the prudence of making a tender to the party grieved of such amends as shall be reasonably judged sufficient for the wrong done, in order to bring himself within the protection of the statute 11 Geo. 2, c. 19, s. 20, which provides that a plaintiff shall not recover in any action for an irreguarity if a tender of compensation be made before action brought.

⁷ T. T. 1 Vict.

⁸ Neale v. McKenzie, 1 C. 1. & R. 61; Fisher v. Thames

Junction Railway Company, 5 Dowl. P.C. 773.

⁹ Irwine v. Reddish, 796.

SECTION III.

Of an excessive Distress, and of the several Remedies.

Of an excessive distress.

The party distraining will be guilty of making an excessive distress, unless a reasonable proportion be observed between the amount of rent due and the goods seized; as if two or three oxen be distrained for 12d.; or a horse or a cow be taken for a small sum, where a sheep or a pig might be had of clearly sufficient value: for the landlord and broker distraining are bound to use due care, and reasonable judge ment, skill, and discretion, with regard to the quantity and value of the goods they take in reference to the demand for which the distress is made. But where only one thing can be found upon the premises, or no other sufficient for the purpose, the distress will not be excessive, however great the value may be. And in every instance, in order to render the distrainer liable, the excess must be considerable, as the law will not take cognizance of every trifling excess.

Excessive distresses were always illegal at common law, and were also declared to be so at a very early period by statutory enactment; first of all, by the statute De districtione scaccarii, 51 Hen. 3, statute 4, and subsequently by the statute of Marlbridge, and the Articuli super Chartas, 28 Edw. 1, stat. 3, c. 12. The terms of the fourth chapter of the statute of Marlbridge are, that distresses shall be reasonable, and not too great; and that he who takes great and unreasonable distresses shall be grievously amerced for the excess of such distresses.

for the excess of such distresses.

Remedy for an excessive distress.

The only proper remedy for an excessive distress is an action on the case under this statute.⁴ Trespass

Field v. Mitchell, 6 Esp.
 71; 2 Inst. 106; Avenell v.
 Croker, M. & M. 172.

² Field v. Mitchell, 6 Esp. 71; Willoughby v. Backhouse, 2 B. & C. 823; s. c. 4 D. & R. 539.

³ 2 Inst. 107.

⁴ Hutchins v. Chambers, 1 Bur. 579; s. c. Hutchins v. Whitaker, 2 Ld. Ken. 204; Lynne v. Moody, 2 Str. 851; s. c. Fitzg. 85; Woodcroft v. Thompson, 3 Lev. 48.

is not in general maintainable; 5 though it has been said, that there is one excepted case, namely, where gold or silver is taken to an excess apparent on the face of it; as where six ounces of gold and a hundred ounces of silver were taken for 6s. 8d.; the ground of this exception being, that as gold and silver are of a known value, and the measure of the value of other things,6 an excessive seizure of them cannot be excused as a mistaken distress, but must be considered as a wholly wilful and unjustifiable trespass. in this instance it would perhaps be safer to adopt the statutory remedy than an action of trespass. an excessive distress be altogether wrongful, or if any irregularity be committed in the conduct of the excessive distress which in its nature is subject-matter for an action of trespass, of course for such separate cause of action trespass may be maintained.7 Trover is not maintainable for the chattels taken in excess under a distress.8 But where there is any ground to contend that the distress is not merely excessive, but altogether wrongful, the action being on the case, a count in trover may be added, and at the trial the special count may be abandoned, without prior notice to the defendant, and the count in trover only relied upon.9 Assumpsit for money had and received is not maintainable for an over-payment of rent under a listress. 1 Neither will a criminal prosecution lie for an excessive distress.2

Where a distress is altogether wrongful, as where the rent has been tendered before the levy, if it be also excessive the party grieved may waive his right

⁵ Id.

⁶ Moir v. Munday, 1 Bur. 190; and see Crowther v. Ramsbottom, 7 T. R. 658; 9 East, 298.

⁷ Lynne v. Moody, 2 Str. 851; Etherton v. Popplewell, 1 East, 139.

⁸ Whitworth v. Smith, 1 Mood. & Rob. 193; s. c. 5 C. & P.259, (Tenderden); Batchelor

v. Vyse, 1 M. & Rob. 331;

s. c. 4 M. & Sc. 552.

⁹ Spargo v. Brown, 4 M. & Ry. 638.

¹ Knibbs v. Hall, 1 Esp. 84. ² Rex v. Ledgingham, 1 Vent. 104; s. c. 1 Mod. 288; Clarke v. Tucket, 2 Vent. 183; Rex v. Bradshaw, 7 C. & P. 233.

to maintain trespass, and sue in case for the excess; either form of action being maintainable under such circumstances.4 But it seems that a plaintiff must in such case make his election as to the injury for which he will sue, and cannot recover both for a wrongful and for an excessive distress.⁵ Thus a recovery in replevin has been held to be a bar to an action for an excessive distress,6 upon the grounds, that the plaintiff had already recovered his goods, and damages for the making and detaining of them; that in the previous action he had treated the taking as wholly tortious, and should not therefore be permitted to say that it was rightful in part. But where a plaintiff has been merely non-prossed in replevin, it seems to be no answer to an action of trespass; for a judgment of non-pros is not a judgment on the merits; at all events, the court has refused a rule to set aside the proceeding in the second action on motion.7

Where growing rent has been reduced by payment of land tax, or other liabilities of the land, if the landlord distrain for the whole amount, he will be liable to an action on the case for an excessive distress.

A landlord is liable to some damages in an action on the case for an excessive distress, where the excess consists wholly in seizing growing crops, the probable produce of which is capable of being estimated at the time of the seizure; but the measure of damages is not the value of the crops, but the inconvenience and expense which the tenant sustains in being deprived of the management of them, or which he is put to in procuring sureties to a larger amount

³ Branscomb v. Bridges, 1 B. & C. 147, s. c. 2 Dowl. & Ryl. 256; 3 Stark. 171.

⁴ Holland v. Bird, 10 Bing. 15; s. c. 3 M. & S. 363.

⁶ Gilb. Dist. by Hunt, 68.

⁶ Phillips v. Berryman, 3 Doug. 286.

⁷ Liversedge v. Goode, 2 Dowl. 141.

See ante, p. 111, et seq.
 Carter v. Carter, 5 Bing.
 406; s. c. 2 M. & P. 723.

e would otherwise have been in replevying the

lodger may maintain an action against the -doer, if his goods are taken on an excessive s by the landlord of the party under whom he

ere an excessive distress has been taken, a does not waive his right of action by entering written agreement with his landlord concerning le of the goods; for a right of action once can be destroyed only by a release under seal, the receipt of something in satisfaction for the done.3

n action for an excessive distress, the plaintiff ot prove, as the sum really due for rent, the amount stated in the declaration; it is sufto substantiate that more was distrained for ras actually due.4 In a recent case, it was 1 that it is not sufficient to prove that the it of distress was for a greater amount than eally due: the plaintiff is not entitled to a , unless the goods seized are excessive in to the sum really in arrear.5 It is not necesprove express malice.⁶ The question for ination, is, what the goods would have sold i broker's sale; and if the distress be excessive ng to that test, the plaintiff is entitled to the fair value of the goods.

rly allied to an action for an excessive distress, Of an action hitherto perfectly distinct from it, is the action for a distress case for distraining for more rent than is due. for more rent than is due. as been said to be an action either at common

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rott v. Birtles, 1 M. &
                           s. c. 8 Moore, 451; 1 C. & P.
                             <sup>5</sup> Crowder v. Self, 2 M. &
er v. Algar, 2 C. & P.
                           Rob. 190.
                              <sup>6</sup> Field v. Mitchell, 6 Esp.
loughby v. Backhouse,
C. 821; s. c. 4 D. &
9; Sells v. Hoare, 1
                             7 Wells v. Moody, 7 C. & P.
11; s. c. 8 Moore, 451.
                           59.
v. Hoare. 1 Bing. 401;
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law, or under the statute of Marlbridge:8 and it is certainly one which has at all times been in no unfrequent use, the validity of it not appearing to have been questioned till very recently. But in a late case at nisi prius, where it appeared by the evidence on a count for distraining for more rent than was due, that the goods distrained were not in fact of greater value than the amount really in arrear, Park, B., expressed considerable doubt whether the facts stated in the court presented any good cause of action. He said it was impossible that the tenant could have sustained any damage from the mere circumstance of his landlord having, at the time of the distress, made a claim for more rent than was really due; and that the substantial question was, whether the landlord had deprived the tenant of more of his goods than the real amount of his debt authorized.9 It is evident that this doctrine would altogether destroy the action for distraining for more rent than was due, by resolving it into an action for an excessive distress. And, indeed, when the old and well established rule, that a man may distrain for one cause and avow for another, and the terms in which it has been laid down, are considered, it seems difficult not to accede to the opinion expressed by the learned judge. said, that a distrainer is never obliged to justify a distress for the cause which he happened to assign at the time it was made. If he can shew that he had a legal justification for what he did, that is sufficient And, again, that it is not material to inquire what the distrainer said when he entered and seized, but only whether he had in fact a legal warrant to justify him.1 Neither does the notice of distress (even sup-

110, pl. 129; Fitz. Abr. Avow-

⁸ Starkie on Evid. 281, n. (p), 2nd ed. Mr. Chitty says, it is at common law, and not founded on the statute; Pl. vol. 2. p. 500, n. (m) 6th ed. See the original words of the statute, infra.

⁹ Wilkinson v. Terry, 1 M.&

Rob. 377. See also Avenell v. Croker, M. & M. 172.

¹ Per Lord Kenyon, C. J., and Lawrence, J., in Crowther v. Ramsbottom, 7 T. R. 654; and see Groenvelt v. Buruel, 1 Ld. Raym, 454; Anon. Godb.

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posing it also to claim a greater amount than is really due) appear to affect the position of the distrainer; for the notice, with the cause of the taking, is required by the statute 2 Will. & M. c. 5, s. 2, only in reference to the sale.² Nor does there appear to be any violation of the statute of Marlbridge, which says, qui districtiones FECERINT irrationabiles, et INDEBITAS. graviter amercientur PROPTER EXCESSUM districtionum ipsarum; for though distraining ostensibly for more rent than is really due may appear pro tanto a distress for rent not due, yet if in fact no more goods are taken than will equal the rent actually in arrear, it must be evident that whatever may be claimed, or professed to be done, no distress is really made for rent not due, and there is no existing or tangible excess in respect of which the distrainer could be hable. In fine, there seems to be no conceivable inary which the party distrained on could suffer in onsequence; for he must be presumed to know the exact amount which he ought to have paid, and an atortionate demand on the part of a creditor cannot excuse a debtor from tendering what is really due. **Iowever** this action arose, therefore, whether its xistence be by the common law or by statute, it vould certainly be very hazardous to rest upon it in uture; and in all probability after the strong opinion xpressed by Parke, B., in the case cited, and the late ct 3 & 4 Vict. c. 24,3 it will never be heard of gain in practice.

y, pl. 232; Butler & Baker's ase, 3 Co. Rep. 26, a; Goverors of Bristol Poor v. Wait, A. & E. 264; Crowder v. eff, 2 M. & Rob. 190.

² Ante, p. 134, 137; and see Gwinney v. Phillips, 3 T. R. 645.

³ Ante, p. 199.

CHAPTER VII.

OF UNLAWFUL RESCUE, AND OF POUND-BREACH, WITH THE SEVERAL REMEDIES.

Rescue, what, RESCUE, or rescous, is the forcible taking away, by the owner or other person, of things distrained, before they are impounded, from the custody of the distrainer.1 But if the distrainer have never been in possession of the goods, there can be no rescue: if a man come to distrain, and be prevented from doing so.2 There may be a rescue in law as well at in deed; as if cattle distrained go upon the premises of the owner whilst being driven to the pound, and he refuses to deliver them up upon demand by the distrainer, this is a rescue in law. But it has been held, in a case of distress damage-feasant, that where the plaintiff distrained the defendant's cattle, and went to apprise the defendant, and during his absence the cattle escaped for half an hour into the defendant's grounds, from whence the plaintiff, on his return, drove them to his own yard, the defendant was not guilty of a rescue for taking them thence; for permitting the cattle to go on defendant's ground was an abandonment of the distress.4 And so, whenever the distrainer quits possession of the distress, the re-taking of it is not a rescue.5

Pound-breach what.

Pound-breach is the breaking the pound or any part thereof, or re-taking the things distrained after they are impounded. For as soon as the distress is impounded in any lawful pound,6 whether off or on the premises, it is, as we have seen, in the custody of the law, and cannot be re-taken without the party

¹ Bul. N. P. 84; Co. Lit. 160, b; F. N. B. 101.

² Id. In which event the proper remedy will be an action on the case.

³ Co. Lit. 161, a.

⁴ Knowles v. Blake, 5 Bing. 499; s. c. 3 M. & P. 314. 5 Dod v. Monger, 6 Mod. 216: Brad. 282.

⁶ As to the pound, see ante, p. 142, et seq. ⁷ Ante, p. 142.

nilty of a pound-breach.⁸ It seems that actual not necessary to constitute the offence of reach. For where an attorney, assuming an y to grant a replevin when he had none, a replevin in his own cause, he was considered a pound-breach.⁹

nlawful rescue of a distress and the breaking nd were always offences at common law, the s for which have been strengthened by staactment.

as we have already seen, in some cases a Rescue when nstead of being a wrong, is a lawful remedy lawful.

party grieved may safely and justifiably expert the protection of his property: that is to erever a distress is altogether wrongful, as is made for something else than for rent; nt when none is in fact due, or after a suffender; or where it is made in the nightender; or where it is made in the nightender; or where it is made in the nightender; and wherever it is a so to a part, as where, in making a lawful the distrainer takes things absolutely priving common law or by statute, or beasts of the rimplements of trade, when there are other able goods on the premises; and where the (before it is impounded) is unlawfully defter tender of the arrears of rent due and the of the taking. In these and all similar cases,

t was held at comthat if the lord had led a seisin of rent, t could not rescue a lade for it upon the of his never having lich rent; (although tenant held by one int gained seisin of rent, it was held, tenant might tender what was really due, and rescue the distress made for the rent by encroachment; Bevil's case, 4 Co. Rep. 11, b.) and, therefore, in general it was considered that if any part of the rent distrained for was in arrear, or if the tenant held by other services than those distrained for, he could not make rescue. Bro. Abr. Rescous, pl. 14, 18.

[.] B. 100; Alwayes , 2 Lutw. 1262. innion's case, 11

² See ante, p. 176, 119, 125.

³ See ante, p. 101, 179.

⁴ Six Carpenters' case, 8

where the distress is absolutely wrongful, and not irregular or excessive merely, rescue may be legally made.

In the case of a distress of cattle it is laid down, that if the lord come to distrain cattle which he sees within his fee, and the tenant or any other person, in order to prevent the lord from distraining them, drive the cattle out of the fee, yet the lord may immediately follow and distrain them; and the tenant cannot make rescue, although they be taken out of the lord's fee. But if the lord coming to distrain had no view of the cattle within his fee, although the tenant drive them off purposely, or if, after the view, the cattle of their own accord go out of the fee, or the tenant remove them for any other cause than to prevent the distress, and the lord afterwards distrain them out of his fee, the tenant may make rescue.

Rescue must be made by the tenant or owner of the goods, by himself or by his agent or servant; and not by a stranger, who can have no right to dispute the distress. Therefore, if the goods of two persons be wrongfully seized in one distress, each can rescue only his own, being a stranger to the remainder of the distress; and in such case severance, if possible, should be made; or the one party may justify as the servant of the other.

'ound-breach vhen lawful. Even in the case of pound-breach there is one instance given, in which, at common law, a distress might be taken out a pound, without the party becoming guilty of a pound-breach: for it is said, that if there be lord, mesne, and tenant, and the tenant be distrained by the lord for rent alleged to be due from the mesne, the mesne (to relieve the tenant) may take the tenant's cattle out of the pound, and put his own in their stead.

Co. Rep. 146; Bevil's case, 4 Co. Rep. 11, b; Firth v. Purvis, 5 T. R. 433.

Co. Lit. 161; Brad. 281.
 Bro. Abr. Rescous, pl. 7,
 12.

⁷ Roll. Abr. 673.

⁸ F. N. B. 102, and notes.
⁹ Jennyngs v. Playstown,
Cro. Jac. 568.

¹ Co. Lit. 100, a; Tresham's case, 9 Co. Rep. 110, b.

And now, by the statute 5 & 6 Will. 4, c. 59, s. 5, it is enacted, that in case any horse, ass, or other cattle or animal shall, at any time, remain impounded without sufficient daily food or nourishment more than twenty-four hours, it shall be lawful for any person or persons whomsoever, from time to time, and as often as shall be necessary, to enter into and upon my common pound, open pound, or close pound, or ther inclosed place, in which any such cattle or mimal shall be so impounded, and to supply such attle or animal with such good and sufficient food md nourishment during so long a time as such cattle r animal shall so remain impounded, without being iable to any action of trespass, or other proceeding, y any person or persons whomsoever for or by any eason of such entry or entries for the purposes foresaid.

At common law, the remedy for an unlawful Remedy at escue is an action of trespass, formerly founded on common law he writ of rescous, for taking and detaining the for a wrongful pods distrained and about to be impounded; in rhich a count may be added for assaulting the disminer or bailiff.² Trover is not maintainable, beanse the landlord at common law had only a power detain the goods, and though, by statute, he is now uthorized to sell, yet he has not at any time any roperty in them.3 Neither is a rescue an indictable ffence.4 If there be a rescue of several distresses r different rents, the whole may be included in ne action of trespass.⁵ As may also a rescue and pound-breach.6

The person entitled to the remedy is he in whose ght the distress was made, he being the party niured by the rescue. Therefore, if a distress taken v a bailiff be rescued, the landlord, not the bailiff,

Ravm. 83.

² F. N. B. 101.

³ Per Probyn, C.B., Moneux Goreham, 29 MSS. Sergt. lill, 279.

[;] P. 233.

⁴ Rex v. Bradshaw, 7 C.

⁵ Hale, note to F. N. B. 101; Bro. Abr. Rescous, pl. 1. ⁶ F. N. B. 101, 102; Ld.

should bring the action; and he may recover, not only for the rescue, but also for the battery of his servant, and for the loss of service. But in the case of a distress by the Crown, the bailiff making the distress is personally entitled to the remedy, and not the Crown.

It is said the declaration must specify the place of the rescue, and shew the times when the rent accred for which the distress was made: 9 but to avoid any danger of a variance, no terms of the tenancy should be unnecessarily stated. 1

The defendant may plead the general issue, not guilty, or any special matter in bar.² Riens is arrent is a good plea,³ since it is lawful for a tenant distrained on for rent not due to make rescue, without being driven to replevy. The tenure is traversable in this action; and it must be specially denied as the defence of non tenuit could not, even before the R.G. H. T. 4 W. 4, be admitted under the plea not guilty.⁴

This remedy by action of trespass at common law for a rescue of a distress for rent is seldom resorted to at the present day, in consequence of the more eligible remedy given by the statute 2 Will. & M. c. 5, which we shall presently mention.

Remedy at common law for a pound-breach.

At common law pound-breach was a still higher offence than an unlawful rescue: for if a man broke the pound, or the lock of it, or any part of it, he greatly offended against the peace, committed a tree pass against the crown and to the lord of the fee, the sheriffs, and hundredors, in breach of the peace, and to the party in delay of justice. So that even hue and cry might be raised against the offender, as against those who broke the peace; it might be inquired of in the sheriff's tourn, as an offence in direct contempt of the

⁷ Alwayes v. Broome, 2 Lutw. 1263.

⁸ F. N. B. 101, 102.

Hale's note to F. N. B.
 101; Kitt. 227, a; Com. Dig.
 Pl. C. 19; Bull. N. P. 61;
 T. R. 130.

¹ 1 Doug. 665.

² Bro. Abr. Rescous, pl. 28, ³ Idem. pl. 6. But see Idem. pl. 10, 16.

⁴ Bull. N. P. 62.

⁵ 1 Russ. 363.

⁶ Mirror, c. 2, s. 26; Brad. 287.

of the law. In addition, the party who I may retake the goods wherever he finds d again impound them.8 But it seems that t, in the latter case, break open the house the grounds of a third person for that purleast not unless on fresh pursuit; and he be guilty of any breach of the peace in such

e usual remedy at common law for this inan action of trespass, founded formerly on de parco fracto. This action also must be by the person in whose right the distress , and not by the bailiff who distrained, nor und-keeper or general owner of the pound, and is for the time being the pound of the .1 Yet it seems that the action will not, r circumstances, lie against the owner of the or he might justify under a plea of liberum m; and the proper remedy in this instance, a special action on the case.2 It is not ne-1 the declaration to make a title to the disause the unlawfulness of it can be no excuse ad-breach.3

ost eligible and useful remedy at the present Remedy for rescue or pound-breach, in the case of dis- rescue or rent, is that given by the statute 2 Will. & pound-breach under the stat. 3. 4, which provides "that upon any pound- 2 Will. & M. rescous of goods or chattels distrained for c. 5, s. 4. person or persons grieved thereby shall in a ction upon the case for the wrong thereby , recover his and their treble damages and uit, against the offender or offenders, in any ous or pound-breach, any or either of them,

k. P. C. 67. t. 47, b; 160, b. mbe v. Pinche, Esp. 6th ed.; Rich v. Bing. 651; s. c. . 663; Russell v. & P. 416. Thereof recaption on a ist aver that the

recaption was on fresh pursuit. Rich v. Woolley, ut

¹ F. N. B. 100; see ante, p. 143, 146, n. 4.

² Holman v. Tuke, Winch,

³ Anon. 1 And. 31; Cottsworth v. Bettison, 1 Salk. 247.

or against the owners of the goods distrained, the same be afterwards found to have com use or possession."

In an action on this statute, it is necessary a title to the distress, by setting forth the upon which the rent accrued, and shewing t rent was due.4 And in general to shew t distress is warranted by the act:5 but it is no sary to allege or prove that the notice requi viously to the sale of the distress was given. such notice cannot be required against wrong The venue should be laid where the rescue mitted, for the rescue is the gist of the act the rest is mere matter of inducement.7

It is no defence in an action on this stat the defendant made a tender of the rent a after the impounding.8

It has been decided that the word "treble to the costs as well as to the damages, and quently that both damages and costs shall be

In a case where the distress is impounded premises, under the statute 11 Geo. 2, c. 19, taking of the goods is a pound-breach wi statute 2 Will. & M. c. 5, although it might amounted to a pound-breach at common law.

⁴ Dod v Monger, 6 Mod. 215; Bellasis v. Burbridge, 1 Lutw. 214.

⁵ Id.

⁶ Id.

⁷ Id. s. c. Ld. Raym. 170; Brad. 291.

⁸ Firth v. Purvis

⁹ Lawson v. Ste Raym. 19 s. c. Cart I Firth v. Purvi

^{432;} Brad. 291.

CHAPTER VIII.

REMEDY IN CASE OF FRAUDULENT REMOVAL.

WE have already seen 1 that in cases of fraudulent emoval of the tenant's goods, the landlord is empowered by the statute 11 Geo. 2, c. 19, s. 1, (exending the time given by the statute 8 Anne c. 14, . 2) to follow and distrain them wherever they may e found, within thirty days after such removal, (uness previously sold bond fide to a person not party o the fraud2); and afterwards to dispose of them in he same manner as if they had been distrained on he premises demised.

But it will be proper to consider in this place the Remedy arther remedies or rather the means of prevention, pro- against tenants ided by the legislature, in order "to deter tenants from fraudulently removing raudulently conveying away their goods and chattels, goods, and nd others from wilfully aiding or assisting therein, against perr concealing the same:" for which purpose it was sons assisting nacted by the statute 11 Geo. 2, c. 19, s. 3, that if them. my tenant shall so fraudulently remove and convey way his goods or chattels, or if any person or perons shall wilfully and knowingly aid or assist him in ach fraudulent conveying away or carrying off any part of his goods or chattels, or in concealing the ame; every person so offending shall forfeit to the andlord double the value of the goods by him or hem respectively carried off or concealed, to be reovered by action of debt in any of his Majesty's By action of courts of record at Westminster. By sec. 4 it is debt for douprovided that in case such goods do not exceed the of the goods. The pounds, the landlord or his agent may exhibit a complaint in writing against such offender or offenders, before two or more justices of the peace By order of of the same county, riding or division of such county, two justices esiding near the place whence such goods and chat- where the els were removed, or near the place where the exceed 50l.

¹ Ante, p. 126.

² Sect. 2.

same were found, not being interested in the lands or tenements whence such goods were removed; who may summon the parties concerned, examine the fact, and all proper witnesses upon oath, or if any such witness be one of the people called quakers, upon affirmation required by law; and in a summary will determine, whether such person or persons be guilty of the offence, with which he or they are charged; and inquire in like manner of the value of the good and chattels by him, her, or them respectively fraudulently carried off or concealed as aforeside and, upon full proof of the offence, by order under their hands and seals, the said justices of the pease may and shall adjudge the offender or offenders pay double the value of the said goods and chatter to such landlord or landlords, his, her, or their bail servant, or agent, at such time as the said justice shall appoint. And in case the offender or offender having notice of such order, shall refuse or neglet so to do, may and shall by warrant under their hand and seals, levy the same by distress³ and sale of the goods and chattels of the offender or offenders; for the want of such distress, may commit the d fender or offenders to the house of correction, there be kept to hard labour, without bail or main prize, to the space of six months, unless the money so order to be paid as aforesaid shall be sooner satisfied.

By the two succeeding sections a right of appeal is given from such order to the justices of the new general or quarter sessions, who are authorized to hear and determine such appeal, and to give costs to either party, and whose determination is to be final provided, that where the party appealing shall entit into a recognizance with sufficient surety, in doubt the sum ordered to be paid, with condition to appeal at such general or quarter sessions, the order of the said two justices shall not be executed against him to the mean time.

We have seen above what cases have been decide to be within the first section of this statute.

³ As to such a distress, see ⁴ Ante, p. 127, 128. post, Part 3.

hird section is considered so far penal, that, tion by the landlord against a third party for the tenant in such fraudulent removal, it is essary to bring the case by strict proof within is of the first section; and that the landlord ove, not only that the defendant assisted the n such fraudulent removal, but also that he v to the fraudulent intent of the tenant.⁵ In of a creditor of a tenant it has been held, may with the assent of his debtor take posf the goods of the latter, and remove them premises for the purpose of satisfying a debt, without incurring the penalty inflicted ird section of the statute, although the cretes possession knowing the tenant to be in d circumstances, and under an apprehension landlord will distrain.6

h an action the acts and orders of the tenants issible evidence of his own fraud, and of ge on the part of the defendant, if by other he is proved to have contributed to the f it; and circumstances of suspicion may be ore the jury to prove such a fraudulent coas the legislature contemplated: and it is ssary, to support such an action, that it e proved that a distress was in progress, or be put in execution, or even contemplated: igh if it be shewn that the rent was in arrear, the goods were removed afterwards.7

an action is brought on the third section he tenant himself for fraudulently removing to avoid a distress, it is not necessary to actual participation in the removal, if it be have been with his privity.8 The plea of or, it seems, of not guilty, is still admissible;

Price, 138; s. c. 9 Price,

[?] v. Noakes, 8 B. & s. c. 2 M. & Ryl.

v. Meats, 5 M. &

^{301.} And see Woodgate v. Knatchbull, 2 T. R. 154. 8 Lister v. Brown, 3 D. & Ryl. 501; s. c. 1 C. & P. 121.

y v. Wharton, 10

and it puts in issue all the allegations of fact wh are necessary to make out the offence.9

The fourth section of the statute, giving the su mary remedy before two magistrates, provided to value of the goods is not above 50l., does not to away the jurisdiction of the superior courts in the where the goods are of less than that value. A the fact, that the landlord, in the first instance, make his complaint before a magistrate, will not precly him from afterwards maintaining an action: for the remedy given by that section is cumulative, a therefore the landlord may elect, at his option, to course most convenient to himself: that is to a in all cases, whatever the value of the goods, a landlord may have his remedy by action of debt, a where the amount does not exceed 50l. he madopt the more summary remedy.

It has been decided, that the justices under t section may inquire into and adjudicate on an inf mation for the alleged fraudulent removal of go by a tenant, although it appear that the property the premises is disputed, and that the tenant has p the rent to one of the claimants.³

Justices, either of the county from which tenant removed the goods, or of that in which the are concealed, may convict the offenders in their office counties.⁴ The complaint may be made to one justice only, and he may issue the summons; but case must be heard before two justices, and to order must be made by them.⁶

Jones v. Williams, 4 M.
 W. 375.

<sup>Horsfall v. Davy, Holt.
147; s. c. 1 Stark, 169; and see Baster v. Carew, 3 B. & C. 649; s. c. 5 D. & Ryl.
558; Stanley v. Wharton, 9 Price, 301; 10 Price, 138; Bromley v. Holder, 1 M. & M. 175.</sup>

² Stanley v. Wharton, 10 Price, 138.

³ Coster v. Wilson, 3 M W. 411.

⁴ Rex v. Morgan, Cald. l ⁵ 3 Geo. 4, c. 25, s. 2.

⁶ The goods need not enumerated or specified into order of the justices; it sufficient if they find twalue; Rex v. Rabbits, 6. & Ryl. 343; and see Chith Burn's Justice, vol. 1. 6 Distress, p. 1129. The aff

be noticed that by the statute 2 & 3 Vict. 4, (an act for regulating the police courts in polis), one magistrate may do any act, which w now in force, or by any law, not containing s enactment to the contrary, hereafter to be r shall be directed to be done by more than e: so that all the above proceedings under : 11 Geo. 2, c. 19, s. 4, may be transacted I by one metropolitan police magistrate only. st also observe that there is a clause intro- Prevention the statute 2 & 3 Vict. c. 47, s. 67, (an stoppage of ther improving the police in and near the carriages cl ther improving the points in and that the destinely result is, to prevent fraudulent removal within the moving goo he operation of that act, by which it is pro- under 2 & 3 it shall be lawful for any constable to stop Vict. c. 47, 1, until due inquiry can be made, all carts 67. ges which he shall find employed in removrniture of any house or lodging, between of eight in the evening and six in the folorning, or whenever the constable shall l grounds for believing that such removal r the purpose of evading the payment of rent.

the justices is an not a conviction, , therefore, like a be returned to the an amended form; thire (Justices), 5 19. It must shew e of it, that the ring the goods was 1 that is not sufown by stating, aplaint duly made was charged with idulently removed from certain prerevent A. B. from them for arrears e to him for the ses, and that it hat he did so rehe is convicted t seems also that

the order should state that the complainant was the party's landlord, or the bailiff, servant, or agent of such landlord; Rex v. Davis, 5 B. & Ad. 551; s. c. 2 N. & Man. 349. Where the warrant of commitment did not state that there had been a complaint in writing to the justices, or that the examination of witnesses was upon oath; but referred to the order of the justices (for payment of double the value of the goods removed), in which those matters were stated; it was held sufficient, and that the justices were not liable in trespass. Coster v. Wilson, 3 M. & W. 411.

CHAPTER IX.

OF A DISTRESS FOR A RENT-CHARGE UNDER TO ACTS FOR THE COMMUTATION OF TITHES IN EM-LAND AND WALES.

Of the tithe commutation rent-charge.

We have reserved for separate notice in this place a new and peculiar species of rent-charge, which from its anomalous origin and character, and fine the distinctive features of the remedy of distress renexed to it, cannot be considered in common with a rent-charge of the usual kind. This is the rest charge created under the recent acts for the commutation of tithes in England and Wales.

The tithe commutation act, 6 & 7 Will. 4, c. 71. (amended by 1 Vict. c. 69; 1 & 2 Vict. c. 64; 2 & Vict. c. 62; and 3 Vict. c. 15), has for its object convert all tithes and all payments in lieu of tithe into a permanent annual payment, variable according to the price of corn. This payment is properly called a rent, because it is an annual profit issuing out the land; and a rent-charge, because the land is by statute charged with a distress for its recovery.

Peculiarities of the tithe commutation rent-charge and of the distress.

The principal points of difference between this at the common rent-charge are, that it is universa payable half-yearly; that instead of being certain uniform in its amount, it is liable to a continual char from year to year, according to the average price corn for the seven years ending at each precedu Christmas; that a distress for it cannot be made it has been in arrear for twenty-one days, nor will ten days' notice has been given; that only two arrears can in any case be recovered; and that power of distress extends to all lands within parish occupied by the owner, or under the landlord or holding. Where the rent-charge issue out of lands in the possession of Quakers, there still further peculiarities. The subject will be be treated by reference to the terms of the enactment;

Amount of the rent-charge

The statute 6 & 7 Will. 4, c. 71, after provide the means and rules for ascertaining the total amount

paid by way of rent-charge in every parish or how ascerct, and of making an apportionment of such tained.

amount amongst the several lands in every such or district, either by parochial agreement, confirmed, or by compulsory award of the tithe issioners, enacts;—that immediately after the g of the act, and also in the month of January ry year, the comptroller of corn returns for the eing, or such other person as may from time e be in that behalf authorized by the privy l, shall cause an advertisement to be inserted London Gazette, stating what has been during years ending on the Thursday next before nas day then next preceding the average price imperial bushel of British wheat, barley, and omputed from the weekly averages of the corn 3.1 And that every rent-charge charged upon id by any apportionment shall be deemed at ne of the confirmation of such apportionment of the value of such number of imperial bushels, ecimal parts of an imperial bushel of wheat, and oats, as the same would have purchased, prices so ascertained by the advertisement

prices so ascertained by the advertisement led immediately after the passing of the act, in ne-third part of such rent-charge had been d in the purchase of wheat, one-third part f in the purchase of barley, and the remaining art thereof in the purchase of oats; and that pective quantities of wheat, barley, and oats so ined, shall be stated in the draught of every ionment.

s last clause has been altered by the tithe ment act, 1. Vict. c. 69, s. 4, which provides, shall not be necessary to state in any instruof apportionment the several quantities of

and nine-pence; and consequently at these prices (as was afterwards enacted by the 1 Vict. c. 69), the conversion from money into corn was to be made.

t. 56. The average, d immediately after ing of the act was,—
even shillings and one; barley, three shild deleven pence halfoats, two shillings

wheat, barley, and oats charged upon the any landowner, or upon any portion of su included in such apportionment; provided, whole sum agreed or awarded to be paid b rent-charge instead of the tithes of the who or district be therein stated, and the whole i bushels of wheat, barley, and oats ascertain the fixed quantity of corn of which the varie is to be paid in money by way of rent-chi also the several sums of money which we time of the confirmation of the apportion equal value with the quantities of wheat, ba oats apportioned on each estate, or each portion thereof, according to the provision former act so stated therein.

The statute 6 & 7 Will. 4, c. 71, then pr enact;—that from the first day of January lowing the confirmation of every apportion lands of the parish to which it relates shall lutely discharged from the payment of a (except so far as relates to the liability of ar at rack-rent dissenting, as afterwards pro the act), and instead thereof there shall be thenceforth to the person in that behalf men the apportionment a sum of money, equal according to the prices ascertained by the tl preceding advertisement to the quantity o barley, and oats respectively mentioned then payable instead of the said tithe, in the nat rent-charge issuing out of the lands charge with; and that such yearly sum shall be pa two equal half-yearly payments on the first da and the first day of January in every year, payment (except in the case of barren reclaim as afterwards provided in the act), being on day of July next after the lands shall have b charged from tithes as aforesaid; and the rent-charge may be recovered at the suit person entitled thereto, his executors or ado tors,2 by distress and entry as afterwards mer

The 86th section of the the 4 & 5 Will. 4, c. act extends the provisions of p. 38, n. 8.), to

very first day of January, the sum of ceforth payable in respect of such rentvary so as always to consist of the price number of bushels and decimal parts of a reat, barley, and oats respectively, accordrices ascertained by the then next pretisement; and that any person entitled o time to any such varied rent-charge, the same powers for enforcing payment re contained in the act concerning the -charge: provided always, that nothing contained shall be taken to render any asoever personally liable to the payment rent-charge: provided always, that the which shall be apportioned upon any parish, which during any part of the even years preceding Christmas, one ght hundred and thirty-five, were extithes, by reason of having been enclosed t of parliament, or converted from barren te ground, shall be payable for the first first day of July, or first day of January ig the confirmation of the apportionment be nearest to the time, at which tithes ld have become payable for the first time of the said lands if no commutation aken place.3

7-first section of the same statute enacts, When rentthe said rent-charge shall at any time be charge is in unpaid for the space of twenty-one days days, the pery half-yearly day of payment, it shall be son entitled

this statute: resentative of mbent or tithe entitled to a he rent-charge period elapsed payment, in-7 of the death, ination of the 1 person; but, en, the 4 & 5 , gives only a remedy by action or suit to the person entitled to the

apportioned part. Id.

Sect. 67. That part of the section which relates to the time when the rent-charge is to begin, and to the period of the half-yearly payments, has been altered by the amendment acts, 1 Vict. c. 69, s. 11; 2 & 3 Vict. c. 62, s. 10; and 3 Vict. c. 15, s. 13,

thereto may distrain.

lawful for the person entitled to the same, after having given or left ten days' notice in writing at the usual or last known residence of the tenant in posses sion, to distrain upon the lands liable to the payment thereof, or any part thereof, for all arrears of the said rent-charge, and to dispose of the distress when taken, and otherwise to act or demean himself in relation thereto as any landlord may for arrears of rent No more than reserved on a common lease for years: provided that not more than two years' arrears shall at any time be recoverable by distress.

two years arrears to be recoverable.

The section immediately following this gives a remedy by entry, where the rent-charge is in arrear for forty days, and there is not sufficient distress upon the premises.

In the case of Quakers.

The eighty-fourth section of the act lays down the following course to be pursued in the case of Quakers -provided always, that in all cases in which it shall be necessary to make any distress under this act, in respect of any lands in the possession of any person of the persuasion of the people called Quakers, the same may be made upon the goods, chattels, or effects of such person, whether on the premises or elsewhere; but nevertheless to the same amount only, and with the same consequence in all respects as if made on the premises; and that in all cases of distress under this act upon persons of that persuasion, the goods, chattels, or effects which may be distrained, shall be sold, without its being necessary to impound or keep the same.

Powers of distress and entry to extend to all lands within the parish occupied by the owner, or held under the same landlord or holding.

The eighty-fifth section enacts, That whenever any rent-charge, payable under the provisions of this act, shall be in arrear, notwithstanding any apportionment which may have been made of any such rent-charge, every part of the land situate in the parish in which such rent-charge shall so be in arrear, and which shall be occupied by the same person who shall be the occupier of the lands on which such rent-charge so in arrear shall have been charged, whether such land shall be occupied by the person occupying the same as the owner thereof, or as tenant thereof holding under the same landlord under whom he occupie

the land on which such rent-charge so in arrear shall have been charged, shall be liable to be distrained upon (or entered upon) for the purpose of satisfying any arrears of such rent-charge, whether chargeable on the lands on which such distress is taken or such entry made, or upon any other part of the lands so occupied or holden: provided always, that no land shall be liable to be distrained (or entered upon) for the purpose of satisfying any such rent-charge charged upon lands which shall have been washed away by the sea, or otherwise destroyed by any natural casualty.

The terms of the eighty-first section of the 6 & 7 Will. 4, c. 71, which we have given above, render it unnecessary to enlarge upon this subject; for it appears, that in regard of the things distrainable,—in the manner of conducting the distress, and impounding, and disposing of, the goods taken,—in everything, in fact, except the peculiarities expressly noticed in the act—the remedy intended is identical with a distress for rent-service.

The warrant or authority for the bailiff or broker to distrain may be given (with slight alteration) in the usual form.⁴

The distress, even when made upon other lands than those on which the rent-charge is by apportionment expressly charged, under the eighty-fifth action, is not confined to the goods of the party in default, but may be made generally upon such other lands.

In the case of Quakers, the remedy looks not only to the land, but also to the general personal estate of the defaulter, and has the force both of a distress and of an execution; for, on the one hand, it extends to every thing of a distrainable nature on the premises, no matter to whom it may belong; whilst, on the other, it follows the effects of the tenant himself wherever they may be found.

It seems that a notice of the distress and intended sale should be given in the usual manner,⁵ notwith-

⁴ Ante, p. 130.

⁵ Ante, p. 134.

standing the notice required previously to the distre-

being made.

It does not appear to be compulsory on the distrainer to proceed to a sale, excepting in the case of Quakers. But in this latter instance there seems be no discretion.

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There is nothing in the act to prevent the party distrained upon from replevying the goods taken.

'ommutation mmas lands ad commons 1 gross.

It yet remains to notice, in conclusion, the rentent-charge on charge established in respect of a right of occupation of lammas lands and common in gross by the 2 & 3 Vict. c. 62, s. 13, (amended by 3 Vict. c. 15, s. 15); for the right of distress given for its recovery differs not only from that for a common rent-charge, but also from that provided under the previous act for the more usual kind of commutation rent-charge, which we have already noticed. The terms of the enactment are;—that whereas large tracts of land called lammas land, are in the occupation of certain persons during a portion of the year only, and are liable to the tithes of the produce of the said lands increasing and growing thereon, during such occupation, and at other portions of the year are in the occupation of other persons, and in their hands liable to different kinds of tithes arising from the agistment, produce, or increase of cattle or stock thereon; and by reason of such change of occupation, such lastmentioned tithes cannot be commuted for a rentcharge issuing out of, or fixed upon, the said lands, and the previous acts are thereby rendered inoperative in the several parishes where such lammas lands lie; and whereas the said acts are in like manner inoperative in certain cases where a personal right of commonage, or a right of common in gross, is vested in certain persons, by reason of inhabitancy or occupation in the parish where any common may lie, or by custom or vicinage, but without having such right of common so annexed, or appurtenant to, or arising out, or in respect of, any lands on which any rentcharge could be fixed instead of the tithes of the

⁶ Ante, p. 153.

3, or stock, or their produce, increase, or agiston such common, annexed to such personal . ; for remedy thereof be it enacted, that in every where by reason of the peculiar tenure of such , and the change during the year of the occuthereof, or of such right of commonage a rente cannot, in the judgment of the commissioners, ed on the said lands in respect of cattle and received and fed thereon, or of the produce and se of such cattle and stock at such portion of ar as the said lands are thrown open, or where right of commonage alone exists, it shall be for the parties interested in such lands or comand the tithes thereof, in the case of a paroagreement, or for the commissioners in the case ompulsory award, in every such parochial agreeor award respectively, or by any supplemental ment in the nature of a parochial agreement, or upplemental award, as the case may be, where arochial agreement or award has been already to fix a rent-charge instead of the tithes of lammas land or commons, to be paid during eparate occupation thereof by the separate ers, in like manner as other rent-charges xed by the said acts or any of them, and clare in such agreement or award, or supntal agreement or award, as the case may be, sum, or rate per head, to be paid for each of cattle or stock turned on to such lammas r commons, by the parties entitled to the occuthereof, after the same shall have been so a open, or by the parties entitled to such right nmonage as aforesaid; and every such sum be ascertained and fixed upon a calculation of hes received in respect of such last mentioned ation or right for the period, and according to rovisions for fixing rent-charges in the preacts, and shall be due and payable by the of such cattle or stock, on the same being first l upon such lands or commons, and shall be re- The distress ible by the persons entitled thereto by distress for its resuch sum shall be due, in like manner as cattle are distrained and impounded for rent, and be subject to the same provisions as to distress and replevin of the same as are by law provided in cases of distress for rent: provided always, that nothing herein contained shall extend to lammas lands, where no tithes or payments instead of tithes have been taken during the seven years ending at Christmas, one thousand eight hundred and thirty-five, in respect of the cattle or stock received and fed thereon, or of the produce and increase of such cattle or stock at such portion of the year as the said lands are thrown open.

This is a more summary remedy than the distress for the ordinary commutation rent-charge; since it is not necessary that any period should intervene between the moment the rent-charge is payable and the distress, or that any previous notice should be given. Indeed, as far as regards the first seizure, it bears more resemblance to a distress of things damage-feasant, than to a distress for rent; particularly as each head of cattle or stock is distrainable for its own individual and separate charge only. The subsequent conduct of the distress, according to the terms of the act, is in every respect similar to the case of a distress for rent.

PART II.

OF A DISTRESS OF THINGS DAMAGE-FEASANT.

CHAPTER I.

IN WHAT CASES, BY WHOM, AND OF WHOSE AND WHAT THINGS, A DISTRESS DAMAGE-FEASANT MAY BE MADE.

THE earliest form of the law of distress, and the most important branch at the present day, after that of a distress for rent, is a distress of things damagefeasant.

It is a remedy by which, if cattle or other things Distress o be on a man's land, incumbering it, or otherwise thingsdan doing damage there, he may summarily seize them, feasant, we without legal process, and retain them impounded as cases, &c. a pledge for the redress of the injury he has sus- may be m tained.1

As to the instances in which this distress may be made, it may be said, generally, to be a remedy applicable wherever any thing animate or inanimate is upon land doing damage thereto, or to its produce; and it is available for any person who is aggrieved by such damage.

¹ Dicere poterit captor, quod justé cepit averia quia invenit illa in terrà suà, et se-Cundum consuctudinem regni

imparcavit illa, donec damnum suum fuerit emendatum. Fleta, 101, s. 25; 51 Hen. 3,

In the case of the owner of the soil.

Thus the owner of the soil, although he may not have anv interest in the pasture or herbage, may distrain cattle damage-feasant in respect of injury committed by their destroying plants or trees, in which his interest still continues.3

In the case of the grantee of the vesture.

And, on the other hand, a person who is only a grantee of the vesture of the soil may distrain cattle damage-feasant thereon: as, where A. demised to B. the milk of twenty-two cows to be provided by A. and fed, at his expense, on certain closes belonging to him, and he covenanted that B. might turn out a mare, and that no other cattle should be fed there: it was held that, as the separate herbage and feeding of the closes passed to B., he was to be considered the occupier, and might distrain, as damage-feasant. any other cattle of A., found on the land.4

In the case of commoners

So commoners, like other persons, entitled to the use or produce of the land, are entitled to this remedy where their rights are injured by things damage-feasant:5 that is to say, wherever cattle are put upon the common without any colour or pretence of right, as by a stranger, a commoner may distrain them; but he cannot safely resort to this remedy where the owner of the cattle has any colour of right to put them on the land; for that would be for the commoner to judge for himself in a question that depends on a more competent inquiry.7 And it seldom happens that a commoner can distrain the cattle of the lord, except by special custom.8 In some cases, however, he may do so, as where the land was by custom to lie fresh until lady-day in the year succeeding the cutting of the corn, during that time the lord being absolutely excluded from the land, it was held that the commoner might distrain his beasts found thereon.9 So, where by custom the lord could not

^{· 3} Hoskins v. Robins, Saund. 328.

⁴ Burt v. Moore, 5 T. R.

⁵ 1 Roll. Abr. 405; Mary's case, 9 Co. Rep. 112, b.

⁶ Hall v. Harding, 4 Burr.

^{2432; 1} Bl. Rep. 673; Brad. 197.

⁸ Kinrick v. Pargiter, Yelv.

^{9 1} Roll. Ab. 405-6. Burt v. Moore, 5 T. R. 335.

in what Cases it may be made.

put on the land more than three horses after lammasday, it was determined that the commoner might distrain any additional horses, for they were as evidently trespassers on the land, as if they had belonged to a stranger. And it seems, that if cattle be agisted by the lord, and improperly put on the common, the commoners may distrain them as the cattle of a stranger.2 In fact there seems to be good reason why, in many cases, commoners should be permitted to distrain the cattle of the lord, since it is held that even the copyholders of a manor may be entitled to the sole and several pasture of the lord's soil, to the exclusion of the lord himself.³ But where the lord has any pretence of right for putting on his own cattle, although he may have been guilty of a surcharge, provided his number be not absolutely stinted. it is perfectly clear that the commoner cannot dis-train those surcharging. This, indeed, is in accordance with the rule of law which we have stated above, as to when a commoner may exercise the remedy of distress, and which applies equally to the case of a surcharge made by the lord as to that of a surcharge made by another commoner. Thus, to illustrate the rule in the latter instance, if the owner of the cattle have a right of common of pasture for two sheep for every acre of land, here the number of the cattle not being absolutely certain in itself, but requiring a medium to determine it, namely, an admeasurement of the commoner's land, another commoner cannot distrain the cattle surcharging.5 So if the right of common be for cattle levant and couchant on the owner's land, another commoner cannot distrain for a surcharge, but must try by a jury the number accommodated to the land.6 If, however, a

¹ Kinrick v. Pargiter, Cro. Jac. 208; s. c. Yelv. 129. This custom or prescription against the lord is indeed denied to be good in 2 Roll. Ab. 267; but, it seems, for a very insufficient reason. See 4 Burr. 2429; 2 Saund. 324.

² 30 Edw. 3, 27.

³ Hoskins v. Robins, 2 Saund. 324.

⁴ Hodesdon v. Gresil, Yelv. 104; Danv. Abr. vol. I. pl. 6. ⁵ Hall v. Harding, 4 Burr. 2431.

⁶ S. C. Bl. Rep. 674.

commoner's right be absolutely stinted in number, as to put on ten beasts only, and he puts on a greater number, it should rather seem, that the overplus may be distrained by another commoner, and certainly may be distrained by the lord.7 If the stint of common be for one beast, and two be separately put on, it seems that only the beasts last put on can be distrained for the surcharge; but if they are put on together, then the lord may distrain which of them he chuses.8

Whilst speaking of commoners, we may observe, that where a commoner agrees not to exercise his right of common for a certain time, he thereby, during such time, renders himself a stranger to the land, and his cattle, if found there, may be distrained accordingly. Thus, where A. and B. were each severally possessed of part of a common field, with each a right of common over the whole field, and they entered into an agreement not to exercise their rights for a certain number of years; it was held that A. might distrain, as damage-feasant, the cattle of B. coming on his land during that time. 9 But such a distress can be made only for the cattle doing damage on the distrainer's part of the land; for if there be a shack common, (that is, an open common field consisting of different parcels with inter-commonings), of which every one knows his own parcel, and cattle be put on it at an improper season of the year, they can be distrained only by him on whose parcel of the common field they are damage-feasant.

iscellaneous strained mageısant.

If two persons have distinct and independent rights ses in which in the same close, and the cattle of the one, in the ings may be fair exercise of his right, injure that of the other, the remedy of the latter, if any, is by action, not distress. Thus where A. having the exclusive right to dig

9 Whiteman v. King, 2 H.

⁷ 1 Roll. Abr. 665; *Dixon* v. James, 2 Lutw. 1241;

Bl. 4; Brad. 200. 4 Burr. 2431. 1 Roll. Abr. 665; Brad. 8 Ellis v. Rowles, Willes, 200. 638; Brad. 199.

tone in a certain close, avowed distraining the cattle of B., who had the exclusive right of pasture there, is damage-feasant, for having broken the stones:

3. pleaded that there was no fence to keep them off, nor did A. otherwise guard or protect the stones:

A. replied that he was not bound to fence: and on demurrer, the replication was held bad.²

If turves be laid on a common, it seems that they may be distrained by a commoner, as damage-feasant.³

It seems also that the owner of land might, after a reasonable time, distrain, as damage-feasant, tithes set out and not removed.⁴

If cattle be put into a man's pasture for a week, and he afterwards give the owner of them notice that he will keep them no longer, if they be not removed he may distrain them as damage-feasant.⁵

A tenant holding over after the expiration of his term, cannot distrain the landlord's cattle which are put in for the purpose of taking possession; for the landlord has a right to take possession without being driven to an ejectment; and a party wrongfully holding possession cannot treat the rightful owner, who enters on the land, as a trespasser.⁶

Things can be considered as damage-feasant only on a private soil. Thus, it has been decided that corn pitched in a market, or hides brought there for sale, cannot be distrained as damage-feasant; for this is a public place to which persons have a right to bring their goods.

Where it appeared to be the custom of a manor for the bailiff, at certain times, to drive the tenant's cattle feeding on the waste, in order to ascertain

² Churchill v. Evans, Taunt. 529.

³ Bromhall v. Norton, Sir T. Jones, 193.

⁴ Baker v. Leathes, Wightw.

⁵ Noy's Max. 33.

⁶ Taunton v. Costar, 7 T. R. 431; and see Butcher v. Butcher, 7 B. & C. 399.

⁷ Mayor of Lawnson's case, Cro. Eliz. 75; Frasel v. Morris, Noy, 19; Austin v. Whitred, Willes, 623.

whether any of them had surcharged the common, and if such surcharge were found, to distrain the cattle surcharging, as damage-feasant, and impound them in any place within the manor; such a custom was held to be good.7

By whom a distress damagefeasant may be made or authorized.

Who can be said to be the proper party or parties to make or authorize a distress of things damagefeasant seems to depend upon the possession of the land to which the injury is done. So that it has been determined that if a distress damage-feasant be made in respect of a right of common of pasture to which two tenants in common are entitled, the distress should be joint, for it is made in respect of their joint possession, and not of their several estates.8

Of whose things a distress damagefeasant may be made.

It matters not to whom the things distrained belong, if they be really trespassing on the land; for this branch of the law of distress knows no exemption in respect of the ownership or nature of the things distrainable. So that cattle may be taken damage-feasant, although they came on the land without their owner's knowledge or consent, or by the default of another.9

What things distrained damagefeasant.

As a distress damage-feasant is made for the injury are liable to be caused by the very thing distrained, it follows, that no kind of thing, which is capable of being in a position to be damage-feasant, can be exempted from the scope of this remedy; therefore, none of the exemptions from liability to distress for rent² are in any manner applicable to the cause of distress at present under consideration; except, indeed, that which relates to things in present use:8 for the reason of that exemption,—that an attempt to distrain things under such circumstances would probably lead to a breach of the peace,—is equally applicable to every instance of a distress, no matter for what particular cause it may be made. Thus, a net cannot be distrained, as damage-feasant, which is in a man's hand at the

Exception of things in present use.

⁷ Follet v. Proake, Ld. Raym. 1186. Culley v. Spearman, 2 H. Bl. 386.

^{9 1} Roll. Abr. 665. ¹ Com. Dig. Dist. B. 4.

² Ante, p. 89, et seq. 3 Ante, p. 91.

nor a horse on which a man is actually riding.4 id to have been ruled in one instance, that the le is not applicable to a horse which is merely the time; 5 but in a very recent case, it was pon demurrer, that a horse could not be disdamage-feasant, whilst, according to the terms averment, it was in the actual possession of r, under his personal care, and being actually y him.6 It must also be observed, that where In cases of respass upon land without their owner's know- non-repair of through the default of the owner of the soil, or fences by the landlord or his enant, in not properly repairing the fences, the tenant. njured in consequence cannot distrain, for that be to take advantage of his own wrong.7 But a such case, if the owner of the cattle suffer to remain on the land after notice has been io him to remove them, they may be distrained r damage done after a reasonable time following otice.8

u distress of cattle damage-feasant, they can be A distress ned only for the damage done at the one time damagethey are distrained. So that, if beasts trespass feasant can land on one day, and then go off without being be made only for the parti-. and trespass on it again the next day, and are cular damage aken, they cannot be detained for the damage done at the in both days, but only for that done on the day one time. ich they were distrained.9

l each beast taken can be seized and detained And each beast e damage which has been actually done by itself or thing can be and not for the general damage, or any part of taken only for the damage ich has been done by the others.1

done by itself.

skins v. Robins, 328; Storey v. Robin-. R. 138. igstaffev. Clark, Camb. .ss. 1826. ld v. Adames, Q. B., . 1840. In this case, ly the horse, but also harness, a prong, and : were included in the on, which was held to in the above terms, a sufficient exemption.

See ante, p. 102, et seq.
 Edward v. Holinder, 2 Leon. 93; Kimp. v. Cruwes, 2 Lutw. 1579; Kemp v. Crewes, Ld. Raym. 168; Com. Dig. Pleader, 3 M. 29; 2 Saund. 285, n. 4. And see ante, ut supra.

⁹ Vaspor v. Edwards, 12 Mod. 660; Brad. 204.

¹ Id.

A second distress of the same cattle may be made for a new injury. Action of trespass a concurrent remedv with a distress of feasant; the adoption of either a prevention of the other.

The same cattle may be distrained a second for a new injury, where they are caught tresp again, subsequently to a distress, even though were replevied after the first.2

It must be remembered, that whenever a d damage-feasant may be made, an action of tr may be maintained for the same grievance; a form of remedy is at the election of the party in But unless the damage be clearly considera things damage- would be advisable, with a view to the costs ticularly since the late statute,3 to adopt the r by distress. But if the injury be great, as thing doing the damage be not worth the amo damage sustained, the party should bring his The election of the remedy most applicable particular circumstances is important, as both be pursued for the same grievance. For nem bis vexari pro eddem causd; and the adoption is an utter waiver of the other. If, however, tress, taken damage-feasant, escape out of a su pound, or die, without any neglect of the dist he may still have an action of trespass again owner.4 In the case of an action of trespass clausum fregit, where the defendant pleaded th plaintiff distrained his hog damage-feasant f same trespass, and the plaintiff replied, that t escaped without his consent, and that he w satisfied for the damage; though it was ad that if the distress had died, the right of would have revived, it was held that the unless the contrary were shown, was the fault plaintiff, the distrainer. And under such c stances all further remedy is lost.6 It has I been decided whether an action for the trespabe maintained after cattle damage-feasant hav sold to pay for food supplied to them by tl trainer, under the statute 5 & 6 Will. 4, c. 59

² F. N. B. 71. 3 3 & 4 Vict., c. 24; ante,

⁴ Williams v. Price, 3 B. & Ad. 695; Vaspor v. Ed-

dowes, 12 Mod. 658 Raym. 719; 1 Sal Bac. Abr. Trespass, F ⁵ Bull. N. P. 84.

⁶ Cas. temp. Holt,

CHAPTER II.

OF WHEN, WHERE, AND HOW A DISTRESS DAMAGE-FEASANT MAY BE MADE; OF THE MANNER OF TREATING THE THINGS DISTRAINED; AND ALSO OF THE REMEDIES FOR A WRONGFUL DISTRESS.

A DISTRESS of things damage-feasant must, as we Distress have seen, be made whilst they are actually doing mage fea the damage; so that it may be made in the night, when to as well as at any other time, when they are found made. on the land; for otherwise the cattle might escape: and in this respect it differs from a distress for rent, which can be taken only during the day.²

It cannot be lawfully made after a tender of amends Not afte before the taking; nor can the distress be lawfully der of ar detained if a tender be made after the taking, and before the impounding. But after the impounding a tender comes too late to make either the taking or detainer unlawful;3 the rule in this respect being precisely the same in the case of a distress damage-feasant as in that of a distress for rent.4

As to tender, it is said, that in the case of a distress damage-feasant made by a bailiff or servant, it is not sufficient to tender the amends before impounding to the person distraining, but that such tender should if possible be made to the owner of the land himself; unless, indeed, the distress be made by the bailiffs of a manor, who may be considered as authorised not only to make the distress, but finally to dispose of it. 5 But there seems no valid reason why the same rule should not be applicable in this respect to every distress, for whatever cause; and the only real question to be considered appears to be, whether the person actually

¹ Co. Lit. 142, a.

² Ante, p. 119. 3 Sheriff v. James, 1 Bing.

^{341;} s. c. 8 Moore, 334.

Ante, p. 176, and see infra, p. 238.

⁵ Pilkington's case, 5 Co. Rep. 76; Pilkington v. Hastings, Cro. Eliz. 813; Browne v. Powell, 4 Bing. 230.

distraining is the competent agent of the person entitled, as well to settle the distress as to distrain, or for the latter purpose only. Thus, where a man's wife, who was proved to have been in the habit of acting as his agent in such matters, made a distress of cattle damage-feasant in his absence, a tender of amends to her was held to be sufficient.⁶ It must, however, be evident from the very nature of the two causes of distress, and the position of the persons usually employed in either case, that, practically and in fact, a bailiff distraining things damage-feasant is more rarely likely to be invested with authority to settle the distress, than one distraining for rent.

As to what is such an impounding that the tender comes too late, it has been held in a late case that where the cattle had been put into a private pound, but the distrainer admitted that they were about to be forwarded to the public pound, a tender of satisfaction made whilst they were in the private pound

was not too late.7

Where a tender is made after the impounding, if the distrainer think proper, he may of course accept the amends, and let the distress out.

A tender need only be made of amends for the damage done at the time of the distress taken, for the things cannot, as we have seen, be detained for any

previous distinct trespass.8

Vhere a disress damagesasant may be nade.

A distress damage-feasant can be made only on the spot where the injury is done, since the! thing distrained must be taken in the very act; and so strict is this rule, that if cattle are once off the land they cannot be taken even on fresh pursuit, although they may have been driven off the land purposely to avoid the distress, and within the view of the person coming to distrain them. The distress, however, will be justifiable if the distrainer actually entered upon the land whilst the cattle were in it, but not otherwise.

⁶ Browne v. Powell, 4 Bing. 230.

⁷ Id.

⁸ See ante, p. 232.

⁹ Vaspor v. Edwards, 12 Mod. 660.

¹ Co. Lit. 161, a.

² Clements v. Milner, 3 Esp. 95.

how to be made and treated.

We have seen that as things can be considered as lamage-feasant only on private soil, corn pitched in a narket, or hides brought there for sale, cannot be listrained as damage-feasant, for these cannot be said to be damage-feasant in a public market, where persons nave a right to bring their goods for sale: neither an the distress be taken on the highway.4

A distress of things damage-feasant may be made, How a dis ike a distress for rent, either by the person aggrieved of things by the trespass, or by his bailiff or agent.

In a recent case where a servant wrongfully dis- and treate trained the plaintiff's horse on the highway as for damage-feasant, it was held that no prima facie case was made out that the master had authorised the distress in question by proof of his having on other occasions authorised his servant to distrain cattle damage-feasant on his land.5

No particular form is required in making the dis-No notice is necessary. The cattle or things seized should be driven or taken to be impounded: and as this kind of distress, like all others, is within the statute 1 & 2 Phil. and M. c. 12, directing the distress to be impounded in a pound within three miles from the place where it is taken, and in the same county, that rule must be strictly observed.6 It may be impounded either in the private pound of the distrainer, on the premises where taken,7 or elsewhere, or in a public pound. Whether the pound to be selected must be overt or covert, will depend on the nature of the things distrained; and in these particulars the rules which have been laid down in the first part, as to a distress for rent, are equally appli-

to be mad

done without making the distrainer a trespasser. Thus it is said that if a lord distrain beasts damage-feasant on his tenant's land, he cannot impound them on the land itself; but if it be made on his own land, then he may. Bro. Dist. pl. 30; Com. Dig. Dist. (D.) Co. Lit. 47, a.

³ Mayor of Lawnson's case, Cro. Eliz. 75; Frasel v. Morris, Noy, 19; Austin v. Whitred, Willes, 623; Brad. 204.

Stat. Marlb. 52 Hen. 3, c. 15, ante 125; Lyons v. Martin, 3 N. & P. 509.

⁵ Lyons v. Martin, 8 A. & E. 513; s. c. 3 N. & P. 509. ⁶ Ante, p. 144, 145.

⁷ That is to say, if it can be

cable to a distress taken damage-fear cases of cattle impounded, the distrainer by the statute 5 & 6 Will. 4, c. 59, s them with necessary food and nourishm he may recover before a justice of the a sale of the beasts after the expiration and the proper notice given. This o not seem to apply to the pound-keeper. been thought to exclude any right in the cattle to supply them with food h distrainer is bound to see that the pou in a fit state to receive the distress.3 iust mentioned that if cattle die in the otherwise lost to the distrainer, before s tained, without any default on his part, not answerable for the loss, but may m tion of trespass against the owner in r injury for which the distress was made.

A distress of things damage-feasant at common law, merely a pledge for the injury sustained it can neither be us of for the benefit of the distrainer. 11 Geo. 2, c. 19, s. 19,⁵ extends only for rent, any use of the distress would an abuse of it, making the distrainer a initio; and as the provisions of the st & M. sess. 1, c. 5, s. 2,7 are only of a distress taken damage-feasant can in 1 sold as a satisfaction for the wrong of case of cattle so distrained it may beco and would then be lawful, under the st Will. 4, c. 59, s. 4, to sell them, in o

⁸ Ante, p. 142, et seq.

⁹ Ante, p. 143; Mason v. Newland, 9 C. & P. 575; who may allow any sum not exceeding double the value of the food; but he ought not to allow more than the actual value, if the owner was willing to supply the food himself. Id.

¹ Id.

^{′ &}lt;sup>2</sup> Id. Sed ³ Wilder v

P. 536; ante, ⁴ Supra, p

⁵ Ante, p. 6 Bagshaw

Jac. 147; Ga 1 Salk. 221. 7 Ante, p.

luce in discharge of the value of food supccording to the provisions of that statute istrainer, and of the expenses attending the at nothing can be retained in respect of the for which the distress was made, the statute all the overplus beyond the value of the I the expenses of the sale, to be returned to r of the cattle.9 If the distress be not sold is statute it may be detained for any length until satisfaction be made, if the distrainer oper to accept it, or until a replevy by the

would be a proper amount of charges for a of things damage-feasant must depend upon mstances of each particular case, and is a for a jury.

tress be wrongfully taken as damage-feasant, Remedies fo r may make rescue, or may have a remedy wrongful di in, trespass, or trover.2 So if it be wrong- tress of thin ined after a sufficient tender of amends made sant. : impounding.3 But it seems that a special the case will not lie against the distrainer ng the amends tendered and afterwards imthe distress, the party grieved being excluifined to the above remedies.4 After the ng a tender of amends, as we have already nes too late to make the acceptance of it ry on the distrainer; for the distress being ie custody of the law, the distrainer cannot

te, p. 206, et seq. te, p. 180, et seq. doubted whether naintainable for a stress damage-fea-. by Adams, 177; ns that the cases orise the use of this tion as a remedy agful distress for hich are conclusive nt. must be recognised as equally applicable to every cause of distress.

o. 152, 153. v. Newland, 9 C.

³ See ante, p. 176; Anscombe v. Shore, 1 Camp. 285. ⁴ Id. The replication to a plea averring a tender of sufficient amends before impounding, must not traverse generally that the defendant did not tender sufficient amends, but must deny either that the sum named was tendered, or that such sum was sufficient. Williams v. Price 3 B. & Ad. 695.

be guilty of a tort in withholding it; and a special action on the case for a refusal of amends under such circumstances has been held not to be maintainable. The proper course to be pursued by the owner where the distress has been impounded before a tender made, and the distrainer refuses a tender made subsequently, is the same as in the case of a distress taken and inpounded for rent.6 It has been held that where cattle were wrongfully distrained as damage-feasant, and the owner paid money for their release, he could not recover it back in an action for money had and record to his use; this form of action being unwarranted by any precedent, and putting the defendant in alessal vantageous position in respect of the pleadings then he would occupy if the approved remedy of repleva or trespass had been employed,7

If a distress taken damage-feasant be sold (except under the provisions of the statute 5 & 6 Will. 4, 5, 59, s. 4), 8 the sale, like any other use or disposal of it by the distrainer, will make him a trespasser of

initio.9

Impounding the distress in another county in contravention of the provisions of the statute 1 Ph. & M. c. 12, has been held not to be an irregularity of abuse of it which makes the distrainer a trespasser initio, but merely a non-compliance which subjects him to the penalties of the statute.

Where a plaintiff declared in an action of trespass for the taking of his cattle, and impounding them so close that one died, and the defendant pleaded the general issue, and a justification that the cattle were damage feasant when taken, without any mention of the dyag of the beast, the issue on the first plea was found for the plaintiff, and on the last for the defendant: but

⁵ Anscombe v. Shore, 1 Camp. 285; s. c. 1 Taunt. 261; Sheriff v. James, 1 Bing. 341; s. c. 8 Moore, 334.

⁶ Ante, p. 177.

⁷ Lindon v. Hooper, Cowp.
414.

⁸ Supra, p. 237.

Per Lord Hardwicke, C.J.
 in Dorton v. Pickup, Sit. after
 Mich. T. 9 Geo. 2; Selv.
 N. P. 686, 9th ed.
 Gimbart v. Pelah, Str.

^{1272;} Woodcroft v. Thompson, 3 Lev. 48.

a was ordered to be given to the defendant; rist of the complaint in the declaration was first taking, the death being mere matter of n, which the defendant was not then called answer; and if the plaintiff had relied upon equent abuse of the distress making the t a trespasser ab initio, he should have is replication accordingly.2

spass for impounding the plaintiff's mare. s a plea that she was damage-feasant to the

his forest; replication, a right of common; , that the mare was mangy and doing dand therefore the defendant took and imher because she was wrongfully in the It was held that the rejoinder was a de-

from the plea.3

been said that where only one part of a disone of several beasts, has been abused, the r becomes a trespasser ab initio as to such v.4

ction for an illegal distress of things as daasant may be brought against the bailiff makr the owner of the land authorizing it, (if he charged), or against both. In an action of for taking the plaintiff's horse, the defenaded, first, not guilty; and, secondly, that se was damage-feasant on his land. The is proved to have been wrongfully distrained ervant of the defendant on the highway, and his land. The court held, that no prima se was made out that the defendant had ed the distress in question by proof of his m other occasions authorized his servant to cattle damage-feasant on his land; and that not adopted the act of his servant by pleading ation of it.5

v. Bayley, 2 Wils.

⁴ Per Holt, C. J., Dod v. Monger, 6 Mod. 215. er v. Stone, 2 Wils. ⁵ Lyons v. Martin, 8 A. &

E. 513; s. c. 3 N. & P. 509; supra, 236.

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The poundkeeper is not liable unless he oversteps his duty.6

In an action for taking and driving the plaintiff's cattle, to which the defendant pleaded a justification that he was lawfully possessed of a certain close, and I that he took the cattle there damage-feasant, the plaintiff may specially reply title in another by whose command he entered.7

The statute 5 & 6 Will. 4, c. 59, s. 19, provides, that if any action be brought for any thing done under that act, it shall be commenced within one month; with fourteen days' previous notice in writing; that the venue shall be local; and that the defendent may plead the general issue, and give the special matter in evidence.8

Of rescue and pound-breach in the case of a distress damage-feasant.

What has been said of rescue and pound-breach in the case of a distress for rent, is for the most part applicable to the present subject. But the only remedy by action for an unlawful rescue or pound-breach, in the case of a distress taken damage-feasant, is the common law remedy by action of trespass;9 the statute of 2 Will. & M. c. 5, applying only to a distress made for rent.1

It is said that if the cattle of a commoner be wrongfully taken as damage-feasant where he had right of common, and he make fresh pursuit, and find them in a pound with the door unlocked, he may justify retaking them.2

It has been decided that if a havward take cattle which are straying in a common or lane, and they are rescued as he is taking them to the pound, this rescue is indictable; but that if he take cattle which are demage-feasant in the inclosed land of any private occupier, the rescue of them before they get to the pound is not indictable; as in the latter case, till the cattle get to the pound, the hayward is to be considered the mere servant of the occupier.3

⁶ See ante, p. 146, n. 4, ⁹ See ante, p. 209, 210. ¹ See ante, p. 211. 7 Taylor v. Eastwood, 1 ² Co. Lit. 47, b.; and Harg. note, 303. ⁸ Mason v. Newland, 9 C. 3 Rex v. Bradshaw, 7 C. & & P. 575.

P. 233.

SUPPLEMENT.

OF THE MODE OF REPLEVYING A DISTRESS.

REPLEVIN, strictly, forms no part of the subject of he present work; excepting, that is to say, so far it has been necessary to consider in what cases a distress may be properly replevied, and the action of replevin successfully maintained. But it is thought that a practical treatise on the law of distress will be rendered more complete and useful by a separate hough brief consideration of replevin in this place. particularly with a view to explaining the manner of proceeding to replevy.

The term replevin is used in two senses; in the Definition one, it means a re-delivery of the pledge or thing the term re taken in distress, to the owner, by the sheriff or his plevin. deputy, upon the owner giving security to try the ight of the distress, and to restore the thing taken If the right be adjudged against him; in the other, t signifies the particular form of action by which the

ight of distress is tried.

Replevin lies for whatever is capable of being dis- Replevin a rained.3 And at common law the right to replevy medy in ca was thought so necessarily incident to the liability to of distress. distress, that a clause in a deed granting a rentharge, to the effect, that if the rent should be in arear and a distress made for it, the party distrained

¹ Ante, p. 180, 181, 189.

² Replegiare est rem apud zium detentam, cautione lezitima interposita, redimerest hæc cautio est stipulatio in formá juris adhibita, de stando juri et sistendo se foro; dic-

tum autem replegiare quasi revadiare, hoc est vadium vel pignus unum loco alterius suggerere et constituere.-Spelm. Gloss. 485.

³ Ante, p. 89, 232.

upon should not be allowed to replevy, was considered void.4

Only when the taking is altogether wrongful.

But we have already seen that it is only when a distress is altogether wrongful, as where no rent whatever was due, or where all arrears had been sufficiently tendered beforehand, that this form of remedy becomes available.⁵ For if anything, however trifling, were really in arrear, so that the distress was not wholly tortious, the injury complained of consisting merely of an excessive seizure, or of some irregularity in the course of proceeding, there is no eventual benefit to be derived from the replevin or action.⁶ The remedy in other instances is by action of trespass, or on the case, &c., according to the particular circumstances.⁷

By and against whom it may be brought.

Whoever brings replevin must have the property in the goods or things distrained. But that property may be either absolute or qualified; for, as we have just seen, wherever the action is maintainable the distrainer must be a wrong-doer, and it will be sufficient to have a good title as against a wrong-doer. Therefore, a bailee, or person to whose custody goods or cattle have been entrusted, may bring the action, as well as the absolute owner.8 Parties who have a joint interest may join in this action.9 But several persons cannot join in one replevin for several chattels where the property in them is several; for each has a several and particular injury done him; and therefore they cannot jointly complain of an unjust caption and detention where the property is several. If the goods of a feme sole be taken, and she marry,

⁴ Co. Lit. 145, b. Replevin is not in law limited to cases of wrongful distress, though in practice it is seldom used under any other circumstances; it applies generally to all cases of goods taken illegally. Com. Dig. Replevin, A. Action, M. 6; Vin. Abr. Replevin, B. pl. 2; Wilk. on Replev. 2, 3.

⁵ Supra, n. 1. ⁶ 5 T. R. 248, n. c.; 3 B. 2 P. 348.

⁷ Ante, p. 118, 200.

<sup>Bro. Abr. tit. Replevia,
pl. 29; 2 Rol. Abr. 430.
3 Hen. 4, 16, a; Co. Lit.
145, b.</sup>

¹ Id.; Gilb. Dist. by Inpey, 137.

usband alone may sue the replevin, because the erty is transferred by the marriage, and vested utely in him;² or the husband and wife may n such case.³ If, however, distress were made marriage, the husband must sue alone.4 Where fe holds as executrix, the action cannot be rht by either of them singly, but they must

Executors are entitled to have replevin for goods of the testator wrongfully taken in his ne, on the principle that the general property is executors, and the possession ought to follow

e action of replevin may be brought against the bailiff or the broker actually making the ss, or the landlord, or other person ordering it, ainst both.7

e action of replevin is said to be of two kinds— Different kind e detinet, and in the detinuit; the former, where of the action s are still detained by the person who took them of replevin. cover the value of them and damages for the g; the latter, when the party distrained upon and his goods re-delivered to him previously by neriff, in which case he can only recover damages ne taking and detention up to the time of the ry.8 But as one of the great advantages of the ly of replevin is the plaintiff's ability to have the s replevied or re-delivered to him immediately they are distrained, the action in the detinet has fallen into disuse and become obsolete.

plevin may be made either by original writ of vin, or by plaint.

common law the replevin was only by writ of Replevin by riari facias, which issued out of chancery, and original writ. nanded the sheriff, upon pledges being given to

. N. B. 69, K. rowne v. Mattaire, Cas. . Hardw. 119. 1. ac. Abr. tit. Replev. (G). ro. Abr. tit. Replevin, 9; Arundel v. Trevyl, 10; Rast. Ent. 560, 561; F. N. B. 69, K.; Gilb. Repl. by Impey, 139. ⁷ 2 Rol. Abr. 431. ⁸ 1 Saund. 347, b. n. 2; Bull. N. P. 52; Com. Dig. Pleader, 3 K. 10; 1 Chit. Pl. 162, 6th ed.; Har. Woodf. Land. & T. 696, 3rd ed.

prosecute (plegii de prosequendo)⁹, to make deliverance to the owner of the goods taken, and afterwards to do justice in respect of the matter in dispute in his own county court. If the sheriff did nothing upon this writ, an alias issued, and upon that a pluries, which recited the alias and contempt upon it, and commanded that the sheriff should make replevin. or himself be present to answer to the contempt? Neither the original writ nor the alias were returnable, but were only in the nature of a justicis to empower the sheriff to hold plea in his own county court, where a day was given to the parties; but as the pluries always contained a clause to the effect that the sheriff should, in default of making the replevin, "show cause before us," it was a returnable process. It was returnable, however, into the Court of King's Bench, Common Pleas, the Court of Cinque Ports, and the County Court.8 sheriff's course of proceeding was to issue his precept to his bailiff to replevy the goods, and a summons requiring the defendant to appear at the next county court to answer the plaintiff for having taken The plaintiff then levied his plaint in the county court, and so proceeded in the action. If the sheriff returned that the goods were eloigned or removed, so that he could not find them, the owner might sue out a writ of capias in withernam requiring the sheriff to take other goods of the distrainer of like nature and value, and to deliver them to the person whose goods had been so eloigned, to keep until his own should be restored.4

ithernam.

plevin by int.

But this process by original writ of replevin was found so extremely tedious and inconvenient, particularly from the necessity of an application to chancery even from the most remote parts of the kingdom, in those times, that at an early period the legislature

See infra.
 F. N. B. 68 (D.).

⁴ Gilb. Replev. by Impey, 102-3.

² 2 Hen. 7, 5, b. ³ 2 Inst. 312; F.N. B., 68,

⁵ Gilb. Replev. by Impey, 85-8.

⁽F).

Of replevying a Distress.

provided a more simple and expeditious remedy. This was effected by the statute of Marlbridge, 52 Hen. 8, c. 21, which enacts, that if the beasts of any man be taken and wrongfully withholden, the sheriff, after complaint made to him thereof, may deliver them without let or gainsaying of him that took the beasts, if they were taken out of liberties; and if the beasts were taken within any liberties, and the bailiffs of the liberty will not deliver them, then the sheriff, for defunit of those bailiffs, shall cause them to be delive ed.

This remedy was rendered even more available and specify by the statute 1 & 2 Ph. & M. c. 12, s. 3, which enacts, that every sheriff of shires, being no estice nor towns made shires, shall at his first county day, within two months next after he hath received his paent of his office of sheriffwick, depute, appoint and poclaim in the shire town within his bailiwick four dputies at least, dwelling not above twelve miles oe distant from the other, which said deputies so apported and proclaimed shall have authority in the sheeff's name to make replevies and deliverance of such istresses in such manner and form as the sheriff my and ought to do, upon pain that every sheriff forevery month that he shall lack such deputy or deputie, shall forfeit for every such offence five pounds, th one half of which forfeiture shall be to the king, te other half to him that will sue for the same by bil plaint, information, or action of debt.

Now, the fore, when any man's goods are distrained or i pounded, he may, by application to the sheriff or to se of his deputies, have a replevin of them upon ging the necessary pledges.

The pledge which the sheriff could take at com- Pledges in mon law weronly that the party replevying would plevin at pursue his activ against the distrainer, or plegii de pro- mon law. sequendo. The soon degenerated into mere matter of form, and becne nominal; indeed they were at all times very inextual, for they were only to answer the amerciames to the king pro falso clamore; and if during the it the tenant sold the cattle delivered to him, al became insolvent, a judgment for

the avowant for the return of the beasts was often of

Under the statute of Westminster the second.

To remedy this inconvenience it is provided by the statute of Westminster the second, 13 Edw. 1, c. 2. that sheriffs or bailiffs from henceforth shall not only receive of the plaintiffs pledges for the pursuing of the suit before the deliverance of the distress, but also or the return of the beasts, if return be awarded. And if any take pledges otherwise he shall answer for he price of the beasts; and the lord that distrainth shall have his recovery by suit, that he shall resore unto him so many beasts or cattle; and if the hilliff be not able to restore, his superior shall resore. These latter pledges are called plegii de retorne habendo. They are answerable to the avowant : the plaintiff dispose of the beasts pending the sui; and if the pledges are insufficient the sheriff himelf is answerable for their insufficiency, for insuficient pledges are as no pledges at all.6 They shold not only be sufficient in estate, that is to say, the to answer in value, but also sufficient in law, an under no incapacity; therefore infants, &c. are not toe taken as pledges, neither is any person politic or ody corporate.7 But the sheriff being himself reponsible, the sufficiency is discretionary with him As the pledges are in the nature of sureties for 1e return, money and cattle which are merely payes, are not pledges within the meaning of the provion.8 a bond will answer the intent of the statu, which requires pledges; for the obligors are reties, and plegii in the old books signifies sureties. And a bond even of the plaintiff in replevin himsel conditioned that he would prosecute the suit wit effect, and would make return, if return were adjlged by law, and also that he would save harmlessnd indemnify the sheriff, has been held to be goodnd sufficient.9

⁶ Co. Lit. 145; 2 Inst. 340; Moyser v. Gray, Cro. Car. 446; Dorrington v. Edwin, 3 Mod. 57; s. c. Skin. 244.

⁷ Har. Wodf. Land. & Ten.700, 3rd e

Gilb. pl. by Impey, 89.
 Black v. Crissop, 1 Ld.
 Raym. 27 Morgan v. Grif-

So it seems that there must not necessarily be more pledges than one, if that one be sufficient; though the words of the act are pledges in the plural number; because, it is said, if one pledge be sufficient the defendant has no loss, and therefore the intention of the statute is answered and provision made for the avowmt's safety.1

From the date of this statute of Westminster the = second up to the passing of the statute 11 Geo. 2, c.

= 19, the pledges taken by the sheriff in replevin were I mader the former statute; and indeed they must be no even at the present day in cases of distress taken mage-feasant, or for any other cause than for rent. But in the latter instance the statute of 11 Geo. 2, Under 11 G e. 19, passed for the better securing the payment of 2, c. 19, s. 2 rents, and preventing frauds by tenants, has enacted, tress was for that to prevent vexatious replevins of distresses taken rent. for rent, all sheriffs and other officers having authonty to grant replevins, may and shall in every replevin of a distress for rent take in their own names, from the plaintiff and two responsible persons as sureties, a bond in double the value of the goods distrained (such value to be ascertained by the oath of one or more witness or witnesses not interested in the goods or distress, which oath the person granting such replevin is enthorized and required to administer) and conditioned for prosecuting the suit with effect, and without delay, and for duly retaining the goods and chattels distrained, in case a return shall be awarded, before any deliverance be made of the distress: and that the sheriff or other officer taking any such bond, shall, on request, assign it to the avowant, or person making cognizance, by indorsing the same, and attesting it under his hand and seal, in the presence

pey, 90. A bond taken under this statute is not assignable at law, but the party may apply to the sheriff for it, and sue upon it in his name.

fith, 7 Mod. 380, Leech's ed.; Hucker v. Gordon, 1 C. & M.

¹ Moyser v. Gray, Cro. Car. 446; Denbawd's case, 10 Co. Rep. 502; Gilb. Repl. by Im-

of two or more credible witnesses; and if the taken and assigned be forfeited, the av person making cognizance may bring an a recover thereon in his own name; and where such action shall be brought, may, b the same court, give such relief to the par such bond as may be agreeable to justice a and such rule shall have the nature and defeasance to such bond.2 The above eng will be perceived, is expressly confined to for rent.3 And in these cases, the pledge taken under it, and must be by bond with ties, in double the value of the goods But it seems, that if the bond be entered in surety only, it will be available by the sher such surety.4 It has been held, however, t conditioned to prosecute the action with to indemnify the sheriff, is good, and assigned, and proceeded on in the nar assignee under the statute, although the co not also require that the suit shall be without delay, and although it contain an u to indemnify the sheriff.⁵

A replevin bond may be taken and assig of the sheriffs of London in his own name In taking the sureties, the sheriff is to reasonable discretion in deciding upon t ciency; and it is a question for the jury v has done so or not.7 If the sureties be insuf proper remedy is by action, and in such penalty of the bond is the limit of damage if the sheriff neglect to take any bond, ac the directions of the statute, the remedy is

² 11 Geo. 2, c. 19, s. 23. 3 A rent-charge has been held to be within the statute; Short v. Hubbard, 2 Bing. 349; S. C. 9 Moore, 667.

⁴ Austen v. Howard, Taunt. 28, 327; s. c. 1 Moore, 68: 2 Marsh. 352.

⁵ Dunbar v. D. 54.

⁶ Thompson v. 1 N. R. 275. 7 Jeffery v. Bas

E. 823. 8 Id.

nd the court will not grant any attacht him.8

listress has been taken for rent, and it is When the replevy the goods and chattels, the replevin must ald be made within five days next after be made. taken, and notice thereof duly given. that time the distrainer may have the ised, and may sell them under the statute sess. 1, c. 5, s. 2.9 Nothing, however, I sale can take away the owner's right to that the removal of the goods from the ter the five days, or an appraisement sale, is of no effect; and the replevin hstanding, be made at any distance of sale has really taken place.¹ In the case taken damage-feasant, since the distress lisposed of, but only kept as a pledge, articular time within which the replevin ade. But if the distress, or any part of any horse, ass, or other cattle or animal, n in this case, must, at the present day, d with reference to the power of sale & 6 Will. 4. c. 59. s. 4.²

r course for the tenant or owner, intend- Practical y goods distrained for rent,3 will be, to directions for im two sufficient housekeepers, living proceeding to replevy goods r county where the distress was made, distrained for the sheriff's office of such city or county, rent. ffice of a deputy of the sheriff of the inted for that purpose under the above the statute 1 & 2 Ph. & M. c. 12, s. 3,4 object and the nature of the claim made. required, in order to enable the sheriff

^{&#}x27;olville, Willes, Lewis, 6 T. R.

^{0, 153.} ling, 5 Taunt. Marsh. 135; Rep. 196, (a); thens, id.

² Ante, p. 152, 238, 239. 3 It will be easily collected from what we have already said, how nearly similar the plaintiff's course of proceeding will be on replevying things taken damage-feasant. 4 Supra, p. 247.

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or his deputy to assure himself that the case is properly the subject of a replevin. The sheriff's replevin clerk will then satisfy himself of the sufficiency of the sureties (if inquiry be necessary); and will also ascertain the value of the things sought to be replevied.

As the sufficiency of the sureties is a matter for the sheriff's discretion, and his discretion a question for the jury, he will, if he does not know them, properly decline to receive them till they satisfy him of the sufficiency by the attendance of other persons, or by information from such persons in writing. for the plaintiff to procure such evidence, as the replevin clerk is not bound to go out of his office and travel about for information. But in a case where a replevin clerk stated that his usual practice, when he did not know the parties, was to examine them personally, and take their own affidavits of their sufficiency, the jury found that the inquiry made did not excuse the sheriff for taking insufficient sureties, and the court approved of the verdict, and said that the sooner an end was put to such a course of proceeding the better.² The statute directs the sheriff to ascertain the value of the goods on the oath of one witness at least not interested in the goods or distress.

After the sheriff or his deputy is satisfied as to the sufficiency of the sureties, and the value of the goods has been ascertained, the bond will be filled up, and must be executed by the plaintiff and his two sureties. (a) A precept or warrant will then be made

(a) The bond is usually in the following form:

Know all men by these presents, that we, A. B., of —, W. X. and Y. Z., of —, are jointly and severally held and firmly bound to M. M., esquire, sheriff of the county of —, in the sum of £— (double the value of the cattle or goods distrained) of lawful money of the United Kingdom of Great Britain, to be paid to the said sheriff, or his certain attorney, executors, administrators, or assigns, for which payment to be well and truly made we bind ourselves, and each and every of us in the whole, our and each and every of our heirs, executors.

¹ Jeffery v. Bastard, 4 Ad. & E. 823.

out, commanding one of the sheriff's officers to replevy the goods, that is, to deliver them to the plaintiff, to abide the event of the suit in replevin; and also to summon the defendant to appear at the next county court to answer the plaintiff for the taking. The sheriff is bound to make replevin on this plaint being made, and sureties found. If the distress were made within a liberty or franchise, or a bailiwick, the sheriff ought first to issue his warrant to the bailiff thereof to make deliverance; and if he make no answer, or refuse to make deliverance, then the sheriff may himself enter the liberty or bailiwick and make deliverance.8 But if the distress were taken out of a liberty and impounded within it, the sheriff may enter the liberty without any previous warrant to the bailiff of it; because the caption, which is one of the points complained of in the replevin, was in the county and out of the liberty; and, therefore, the right to make a deliverance ought to be in that officer within whose district or jurisdiction the cause of complaint first arose.4 Where the lord of a franchise has the preacriptive right to grant replevins in the same manner

and administrators, firmly by these presents. Sealed with our seals. Dated the —— day of ——, 18—

THE CONDITION of the above obligation is such, that if the ebove bounden A. B. do appear at the next county court to be holden for the county of —, at —, on the — day of — next, and do prosecute his suit with effect, and without delay, egainst C. D., for the taking and unjustly detaining of his cattle, goods, and chattels, to wit, (here set forth the cattle or goods distrained), and do duly make a return of the said cattle, goods, and chattels, if a return thereof be adjudged: that then the above obligation shall be void, and of none effect; or else to be and remain in full force and virtue. Sealed, &c.

A. B. W. X. Y. Z.

² Stat. Marlb. c. 21. This part of the act was made to enlarge the power of the sheriff; for at common law he could not enter the liberty

without a non omittas, which was too dilatory. 2 Inst. 139, 140; F. N. B. 68 F.

⁴ Id.; Gilb. Repl. by Impey, 92.

as the sheriff had before the statute of Marlbridge, the sheriff has no concurrent jurisdiction with him.

Notice of the replevin.

As soon as the replevin has been granted, notice ahould be given to the distrainer if there be any inmediate danger of his selling the distress before the officer proceeds to make delivery of it to the owner; for the grant of a replevin is a matter exclusively between the officer who grants it and the owner of the distrained goods, and if the distrainer is to be affected by it, he must receive notice that it has been done. 6 Notice of replevin given by an infant has been held insufficient.

If the distress be drawn into a house, castle, or other strong-hold, the sheriff or his bailiff, after demand made for deliverance of the distress, may break open the house or castle to replevy them. This seems to be the common law; for though a man's house's privileged by common law for himself, his family, and his own goods, so that the sheriff cannot break it open to attach any of them in a civil action at the suit of t private person, yet a man's house could not privilege or protect the goods of another unjustly taken, so to prevent the officer to make replevin; because the privilege and security of a man's house could protect but his own goods. This practice, however, of driving distresses into strongholds was frequent in the barons' wars, and the poor sort suffered so much from the men of power, that the statute of Westm. I, c. 17, expressly gives this power to the sheriff, or his officer, to break the house to make delivery of the cattle, whether the replevin be by plaint or by writ. But this, as is said, must be after demand made, and notice given to the lord to suffer them to be replevied. And, to deter the person distraining from refusing or neglecting to deliver the distress, the statute further directs, that the castle or stronghold shall be razed and thrown down; but this must be on a suit in behalf of the king, wherein all parties concerned in

st must first be heard. And by this act, if the of a liberty, having a return of writs, shall not deliverance for the reason aforesaid, the sheriff proceed without delay, on any new authority, to replevin in manner afore-mentioned.

the goods have been eloigned so that the sheriff Withernam i t replevy them, upon plaint being levied in proceedings unty court by the plaintiff, the sheriff may issue by plaint. ept in the nature of a capias in withernam, 8 comng his officer to take goods or cattle of the lant to the value of the goods taken by him, and r them to the plaintiff; the plaintiff having first him a bond with sureties, conditioned to prohis suit and to return the goods so to be de-1 to him, if a return of them should be afteradjudged.

er the goods have been replevied and delivered plaintiff, he must, according to the terms of and, levy his plaint at the next county court, and rute his suit without delay and with effect. not levy his plaint at the next county court, or make default in any subsequent part of the proigs, or do not prosecute the suit with success, in the county court or in the superior court, if removed, the replevin bond will be forfeited, and edings may be taken thereon against the plainid his sureties.

these proceedings, as well in the action of re-1, as on the bond, or against the sheriff, are sarily foreign to the object of this supplement.

⁸ Gwillim v. Holbrook, 1 B. ilb. Replev. by Impey, & P. 410.



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APPENDIX

OF THE

CIPAL STATUTES RELATING TO THE

LAW OF DISTRESS.

9 HEN. III.

(MAGNA CHARTA)

Vone shall be distrained for more service than is due.

hall be distrained to do more service for a knight's any other freehold, than therefore is due.

51 HEN. III. STAT. 4.

(DE DISTRICTIONE SCACCARRII)

ss shall be taken for the king's debts, and how it shall be used.

AUCH as the commonalty of the realm hath susdamage by wrongful taking of distresses which have by sheriffs and by other the king's bailiffs, for the or for any other cause;" it is therefore provided The owner may d, that when a sheriff or any other man doth take feed his cattle of other, they to whom the beasts do belong may impounded. neir feeding without disturbance, so long as they be without giving any thing for their keeping. And ists nor no other distress taken for the king's debt, Sale of distress. ther cause, be given nor sold within fifteen days after And if any bring the tally of a payment made in er, the distress shall cease; and if he bring the tally ff or bailiff of payment made to them of the thing

and will find pledges that he will appear in the exchehe next account, to do as right shall require, then the l cease, and the sheriff or bailiff shall cause him to be it ought to have acquitted him, that he appear upon ount to do as right shall require, and these shall have of the pledges. Yet it is provided that no man of No distress shall r other, shall be distrained by his beasts that gain be taken of r by his sheep, for the king's debt, nor the debt of plough-cattle or nan, nor for any other cause by the king's or other long as they can find another distress or chattels hereof they may levy the debt, or that is sufficient nand (except impounding of beasts that a man is ground damage feasant, after the use and cusrealm.) And that such distresses be reasonable alue of the debt or demand, and by the estima-

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tion of neighbours, and not by strangers, and not outrageous. Howbeit the king willeth and commandeth that sheriffs or their bailiffs that have received the king's debt of the summons of the exchequer, and have not acquitted the debtors thereof at the next account, shall be punished after the statutes made thereupon. And the king willeth that all debts of summons of the exchequer, that the sheriff or bailiff hath confessed receipt, shall be allowed him forthwith, so that whether he received all the debt, or part, it shall never come more in demand nor summons, after the sheriff hath confessed the receipt.

52 HENRY III.

(STATUTE OF MARLBRIDGE, OR MARLEBERGE)

CAP. 1.—The penalty of taking a distress wrongfully.

"Whereas at the time of a commotion late stirred up! within this realm, and also sithence, many great men, and divers other refusing to be justified by the king and his court, like as they ought, and were wont in time of the king's noble progenitors, and also in his time, but took great revenges and distresses of their neighbours, and of other, until they had amends and fines at their own pleasure; and further some di them would not be justified by the king's officers, nor would suffer them to make delivery of such distresses as they had taken of their own authority:" It is provided, agreed, and granted, that all persons, as well of high as of low estate, shall receive justice in the king's court; and none from henceforth shall take any such revenge or distress of his own authority, without award of our court, though he have damage or injury whereof he would have amends of his neighbour either higher or lower. And upon the aforesaid article it is provided and granted, that if any from henceforth take such revenges of his own authority, without award of the king's court, (as before is said) and be convict thereof, he shall be punished by fine, and that according to the trespass. And likewise, if one neighbour take a distress of another without award of the king's court, whereby he hath damage, he shall be punished in the same wise, and that after the quantity of the trespass. And nevertheless sufficient and full amends shall be made to them that have sustained loss by such distresses.

one shall take istresses but by ne award of the ing's court.

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nd damages.

CAP. 2.—None but suitors shall be distrained to come to a court.

Moreover, none of what estate soever he be, shall distrain any to come to his court, which is not of his fee, or upon whom he hath no jurisdiction by reason of hundred or bailiwick; not shall take distresses out of the fee or place where he hath [no] bailiwick or jurisdiction; and he that offendeth against this statute shall be punished in like manner, and that according to the quantity and quality of the trespass.

3.—A lord shall not pay a fine for distraining his tenant.

any, of what estate soever he be, will not suffer such Persons not ess as he hath taken to be delivered by the king's officers, suffering distresses to be the law and custom of the realm, or will not suffer sum-tresses to be replevied shall , attachments, or executions of judgments given in the be punished. s court to be done according to the law and custom of ealm as is aforesaid, he shall be punished in manner said, as one that will not obey the law, and that according e quantity of his offence. And if any, of what estate r he be, distrain his tenant for services and customs which eges to be due unto him, or for any other thing for the which ord of the fee hath cause to distrain, and after it is found the same services are not due, the lord shall not therefore inished by fine, as in the cases aforesaid, if he do suffer listresses to be delivered according to the law and custom e realm: but shall be amerced as hitherto hath been used. he tenant shall recover his damages against him.

, 4.—A distress shall not be driven out of the county. And it shall be reasonable.

one from henceforth shall cause any distress that he taken to be driven out of the county where it was taken, if one neighbour do so to another of his own authority, without judgment, he shall make fine (as above is said) m a thing done against the peace: nevertheless, if the lord ume so to do against his tenant he shall be grievously shed by amerciament. Moreover, distresses shall be rea- Distresses shall ble, and not too great: and they that take unreasonable be reasonable. undue distresses shall be grievously amerced for the se of such distresses.

•.5.—A confirmation of the great charter, and the charter of the forest.

he great charter shall be observed in all his articles, as i in such as pertain to the king, as to other: and that I be enquired afore the justices in eyre in their circuits, sfore the sheriffs in their counties when need shall be; writs shall be freely granted against them that do offend we the king, or the justices of the bench, or before juss in eyre when they come into those parts. Likewise charter of the forest shall be observed in all his articles. the offenders when they be convict, shall be grievously ished by our sovereign lord the king in form above mented.

CAP. 15 .- In what places distresses shall not be taken.

: shall be lawful for no man from henceforth, for any uner of cause, to take distresses out of his fee, nor in the s's highway, nor in the common street, but only to the 5 or his officers, having special authority to do the same.

CAP. 21.—Who may take replevins of distresses.

It is provided also, that if the beasts of any man be take and wrongfully withholden, the sheriff after complaint med to him thereof may deliver them without let or gainspine him that took the beasts, if they were taken out of libering and if the beasts were taken within any libering, and bailiffs of the liberty will not deliver them, then the shell for default of those bailiffs, shall cause them to be delived.

CAP. 22.—None shall compel his freeholder to any freehold.

None from henceforth may distrain his freeholders to see for their freeholds, nor for any things touching their them without the king's writ: nor shall cause his freeholders to swear against their wills, for no man may do that without king's commandment.

3 EDWARD I.

(STATUTE OF WESTMINSTER 1.)

CAP. 16.—None shall distrain out of his fee, nor drive the tress out of the county.

In right thereof that some persons take and cause to taken the beasts of other, chasing them out of the shire where the beasts were taken, it is provided also, that none from hem forth do so; and if any do, he shall make a grievous fine, is contained in the statute of Marlbridge made in the time King Henry, father to the king that now is. And likewis shall be done to them that take beasts wrongfully, and train out of their fee, and shall be more grievously punished the trespass do so require.

CAP. 17.—The remedy if the distress be impounded in a a or fortress,

It is provided also, that if any from henceforth take beasts of other, and cause them to be driven into a castle fortress, and there within the close of such castle or fort do withhold them against gage and pledges, whereupon beasts be solemnly demanded by the sheriff or by some obailiff of the king's at the suit of the plaintiff, the sheribailiff, taking with him the power of the shire or bailiff do assay to make replevin of the beasts from him that them, or from his lord, or from other being servants of lord, (whatsoever they be) that are found in the place when unto the beasts were chased; if any deforce him of the liverance of the beasts, or that no man be found for the or for him that took them for to answer and make the deance, after such time as the lord or taker shall be admontant.

eliverance by the sheriff or bailiff, if he be in the : near, or there whereas he may be conveniently the taker or by any other of his to make delivere were out of the county when the taking was, and ise the beasts to be delivered incontinent, that the he trespass and despite shall cause the said castle to be beaten down without recovery; and all the hat the plaintiff hath sustained in his beasts, or in :, or any otherwise, (after the first demand made by or bailiff) of the beasts, shall be restored to him the lord or by him that took the beasts, if he have and if he have not whereof, he shall have it of the at time or in what manner the deliverance be made. he sheriff or bailiffs shall come to make deliverance; wit, that where the sheriff ought to return the A non omittas t to the bailiff of the lord of the castle or fortress, the sheriff if the other to whom the return belongeth, if the bailiff do not the franchise will not make deliverance after that the h made his return unto him, then shall the sheriff e without further delay, and upon the aforesaid pains. e manner deliverance shall be made by attachment ade without writ and upon the same pain, and this is ded in all places where the king's writ lieth; and if ne in the marches of Wales, or in any other place king's writ be not current, the king, which is soveover all, shall do right therein unto such as will

None shall be distrained for a debt that he oweth not. vided also that in no city, borough, town, market, re be no foreign person (which is of this realm) disr any debt wherefore he is not debtor or pledge, ever doth it shall be grievously punished, and withthe distress shall be delivered unto him by the he place, or by the king's bailiffs if need be.

13 EDWARD I.

(STATUTE OF WESTMINSTER II.)

I recordare to remove a plaint. Pledges to prosecute a suit. Second deliverance.

auch as lords of fees distraining their tenants for The mischiefs d'customs due unto them are many times grieved which lords disir tenants do replevy the distress by writ or with- training their and when the lords, at the complaint of their suffer. o come by attachment into the county, or unto art, having power to hold pleas of Withernam, and e taking good and lawful, by reason that the tenants hold ought, nor do claim to hold any thing of

him which took the distress and avowed it, he that dist is amerced, and the tenants go quit; to whom punis cannot be assigned for such disavowing by record a county, or of other courts having no record."

A recordare to remove a plaint in replevin out of the county.

II. It is provided and ordained from henceforth, that such lords cannot obtain justice in counties and such ner of courts against their tenants, as soon as they s attached at the suit of their tenants, a writ shall be ; to them to remove the plea before the justices afore and none other, where justice may be ministered unt lords; and the cause shall be put in the writ, wherefor a man distrained in his fee for services and customs due. Neither is this act prejudicial to the law con used, which did not permit that any plea should be before justices at the suit of the defendant. For the appear at the first shew that the tenant is plaintiff and defendant, nevertheless having respect to that, that t hath distrained and sued for services and customs behind, he appeareth indeed to be rather actor or 1 than defendant. And to the intent the justices may upon what fresh seisin the lords may avow the distress able upon their tenants, from henceforth it is agre enacted, that a reasonable distress may be avowed up seisin of any ancestor or predecessor since the time that of novel disseisin hath run. And because it chanceth time that the tenant, after that he hath replevied his doth sell or alien them, whereby return cannot be mad the lord that distrained, if it be adjudged:

Pledges to prosecute the suit and to make return.

III. It is provided, that sheriffs or bailiffs from hen shall not only receive of the plaintiffs pledges for the p of the suit, before they make deliverance of the distre also for the return of the beasts, if return be awarded. any take pledges otherwise, he shall answer for the the beasts, and the lord that distraineth shall have his r by writ, that he shall restore unto him so many be cattle; and if the bailiff be not able to restore, his s shall restore. And forasmuch as it happeneth so: that after the return of the beasts is awarded unto t trainer, and the party so distrained, after that the be returned, doth replevy them again; and when h the distrainor appearing in the court ready to answ doth make default, whereby return of the beasts ougl awarded again unto the distrainor, and so the beasts re twice or thrice, and infinitely, and the judgments giver king's court take no effect in this case, whereupon no hath been yet provided: in this case such process s awarded, that so soon as return of the beasts shall be a to the distrainor, the sheriff shall be commanded by a writ to make return of the beasts unto the distrain which writ it shall be expressed that the sheriff shall liver them without writ, making mention of the ju

relating to the Law of Distress.

given by the justices, which cannot be without a writ issuing out of the rolls of the said justices before whom the matter was moved. Therefore when he cometh unto the justices, A writ of se and desireth replevin of the beasts, he shall have a judicial deliverance writ that the sheriff taking surety for the suit, and also of the beasts or cattle to be returned, or the price of them, (if return be awarded), shall deliver unto him the beasts or cattle before eturned, and the distrainor shall be attached to come at a zertain day before the justices, afore whom the plea was noved in presence of the parties. And if he that replevied After judgm make default again, or for another cause return of the distress thereon, dis e awarded, being now twice replevied, the distress shall re-shall beirre aain irrepleviable; but if a distress be taken of new, and for a pleviable. cause, the process abovesaid shall be observed in the same ew distress.

CAP. 36.—A distress taken upon a suit commenced by others.

"Forasmuch as lords of courts and other that keep courts md stewards intending to grieve their inferiors, where they have no lawful mean to do so, procure other to move maters against them, and to put in surety and other pledges or purchase writs, and at the suit of such plaintiffs compel hem to follow the county, hundred, wapentake, and other ike courts, until they have made fine with them at their will:" t is ordained that it shall not be so used hereafter. And if my be attached upon such false complaints, he shall replevy is distress so taken, and shall cause the matter to be brought fore the justices, before whom if the sheriff, bailiff, or other ord (after that the party distrained has framed his plaint) will dvow the distress lawful by reason of such complaints made into them, and it be replied that such plaints were moved naliciously against the party by the solicitation or procurenent of the sheriff, or other bailiffs, or lords, the same repliation shall be admitted; and if they be convict hereupon, hey shall make fine to the king, and nevertheless restore reble damages to the parties aggrieved.

CAP. 37.—No distress shall be taken but by bailiffs known and sworn.

" Forasmuch also as bailiffs, to whose office it belongeth to ake distresses, intending to grieve their inferiors, that they may exact money of them, do send strangers to take distresses, to the intent that they might grieve their inferiors, by reason that the parties so distrained, not knowing such persons, will nor suffer the distresses to be taken;" it is provided, that no distress shall be taken but by bailiffs sworn and known. And if they which do distrain do otherwise, and thereof be convict, (if the parties grieved will purchase a writ of trespass,) they shall restore damages to the parties grieved. and besides shall be grievously punished towards the king

28 EDW. I.

(ARTICULI SUPER CHARTAS)

CAP. 12.—What distress shall be taken for the king's debt, and how it shall be used.

From henceforth the king willeth, that such distresses as are to be taken for his debts shall not be made upon bests of the plough, so long as a man may find any other, upon the same pain as is elsewhere ordained by statute, &c. And he will not that over great distresses shall be taken for his debts, nor driven too far; and if the debtor can find able and exevenient surety until a day before the day limited to the shell, within which a man may purchase remedy to agree for the demand, the distress shall be released in the meantime; and he that otherwise doth shall be grievously punished.

9 EDW. II.

(ARTICULI CLERI)

CAP. 9.—Distresses on the clergy shall not be taken in :he high ways nor in the ancient fees of the church.

"Also the king's officers, as sheriffs and other, do enter into the fees of the church to take distresses, and sometimes they take the parsons' beasts in the king's highway, where they have nothing, but the land belongeth to the church." The answer. The king's pleasure is, that from henceforth such distresses shall neither be taken in the king's highway, nor in the fees wherewith churches in times past have been endowed; nevertheless he willeth distresses to be taken in possessions of the church newly purchased by ecclesiastical persons.

7 HEN. VIII. CAP. 4.

An act concerning avouries for rents and services.

"Whereas divers, as well noblemen as other the king's subjects, have suffered recoveries against them of diver their manors, lordships, lands and tenements, for the performance of their wills, or for the sureties of their wives' jointure, or for the jointure of their sons and heirs apparent, and their wives, or of any other person or persons, according to their covenants and agreements, and those persons that so have recovered the said manors by the course of the common law, had no remedy, nor may have, to compel the fermors, free-holders and tenants which held of the same manors by rent, services or customs to attorn them; nor could by the order of the law attain to the said rents services or customs (if they were denied) by distress or action, without they could once

relating to the Law of Distress.

attain to the possession of the same rents, services, and customs by paying or doing the said rents, services, or customs by the same freeholders, fermors, and tenants; which to do, divers and many of them have oftentimes refused, and yet do, to the great offence and charge of their conscience, not only to the disinheritance of the said recoverers, but also in breaking of the last wills of them against whom such recovery is had. and also to the disinheritance of the said husband and wife, or other to whose use the same recovery was so had. Also if there were any advowson appendant to any of the said manors, the same advowson had fallen void, and a stranger had presented, the said recoverers, nor they to whose use the same recoveries were had, had no remedy for the same disturbance. and some time thereby they have been disinherited."

II. Be it therefore enacted, that the recoverers in all such Recoverers recoveries, their heirs and assigns, may from henceforth disurain for the foresaid rents, services, and customs so being due and maints and unpaid, and make avowry or justify the same, as those quare impe persons against whom the said recovery is should have done if the said recovery had not been had; and also have like remedy for the recovering of the said rents, services, and customs by avowry; and also a quare impedit for the said advowson, if any disturbance be made; as those persons against whom the said recoveries were had might or should have had by the course of the common law afore the said recovery, if any such rents, services, or customs had been denied them, or sny such disturbance had been had in their time.

III. And also that every avowant, and every other person Avowant sl er persons that make avowry, conisance or knowledge, or recover dar justify as baily to any other person or persons in any replegiari, and costs. or second deliverance for any rent, custom, or service, if their evowry, conisance or justification be found for him, or the plaintiffs in the said actions otherwise barred, shall recover their damages and costs that they have sustained, as the plaintiff should have done if they had recovered in the said replevin.

21 HEN. VIII. CAP. 19.

Apowries shall be made by the lord upon the land, without naming his tenant.

"Where as well the noblemen of this realm, as divers other persons, by fines, recoveries, grants, and secret feoffments; and leases made by their tenants to persons unknown of the lands and tenements holden of them, have been put from the knowledge of their tenants, upon whom they should by order of the law make their avowries for their rents, customs, and services, to their great losses and hindrances,"

II. Be it therefore enacted, that wheresoever any manor, An avowry lands, tenements, and other hereditaments be holden of any be made by manor, person or persons, by rents, customs, or services, that lord upon the lord of whom any such manor, lands the lands the lands the lands the lands the lord of whom any such manor, lands the lands th if the lord of whom any such manor, lands, tenements, or here- him withou

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ditaments be so holden, distrain upon the same manors, lands, or tenements, for any such rents, customs, or services, and replevin thereof be sued, that the lord of whom the same lands. tenements, or hereditaments be so holden, may avow, or his bailiff or servant make conisance, or justify, for taking of the said distresses upon the same lands, tenements, or hereditaments so holden, as in lands or tenements within his fee or seignory, alleging that in the said avowry, conisance, and justification, the same manors, lands, and tenements to be holden of him without naming of any person, certain to be tenant of the same, and without making any avowry, justificand so in second tion, or conisance upon any person certain; and likewise the lord, baily or servant to make avowry, justification, or consance in like manner and form upon every writ sued of second deliverance.

eliverance.

he avowant ball recover amages and osts of suit.

III. And also be it enacted, that every avowant, and every other person or persons that make any such avowry, justification or conisance, as baily or servant to any person or persons in any replegiare or second deliverance, for rents, customs, services, or for damage feasant, or other rent or rents upon any distress taken in any lands or tenements, if the same avowry, conisance, or justification be found for them, or the plaintiffs in the same be nonsuit or otherwise barred, that then they shall recover their damages and costs against the said plaintiffs, as the same plaintiffs should have done or had, if they had recovered in the replegiare or second deliverance found against the said defendants.

IV. And be it also ordained, that the said plaintiffs and defendants in the said writs of replegiare, or writs of second deliverance, and in every of them, shall have like pleas, and like aid-prayers in all such avowries, conisances, and justifications (pleas of disclaimer only except) as they might have had before the making of this act, and as though the said avowry, conisance or justification had been made after the due order

of the common law.

V. And it is further enacted, that all such persons as by the order of the common law may lawfully join to the plaintiffs or defendants in the said writs of replegiare or second deliverance, as well without process as by process, shall from henceforth join unto the said plaintiffs or defendants, as well without process as by process, and to have like pleas and like advantages in all things (disclaimer only except) as they might have done by the order of the common law before the making of this act.

32 HEN. VIII. CAP. 37.

For recovery of arrearages of rents by executors of tenants in fee-simple.

" Forasmuch as by order of the common law, the executors or administrators of tenants in fee simple, tenants in fee-tail,

relating to the Law of Distress.

and tenants for term of lives, of rents, services, rent-charges, rent-secks, and fee-farms, have no remedy to recover such arrearages of the said rents or fee-farms as were due unto their testators in their lives, nor yet the heirs of such testator. nor any person having the reversion of his estate after his decease may distrain, or have any lawful action to levy any such arrearages of rents or fee-farms, due unto him in his life as is aforesaid; by reason whereof, the tenants of the demesne of such lands, tenements or hereditaments, out of which such rents were due and payable, who of right ought to pay their rents and farms at such days and terms as they were due, do many times keep, hold, and retain such arrearages in their own hands, so that the executors and administrators of the persons to whom such rents or fee-farms were due, cannot have or come by the said arrearages of the same, towards the payment of the debts and performance of the will of the said testators:" For remedy whereof, be it enacted by the authority Executors &c of this present parliament, that the executors and adminis- may have actitrators of every such person or persons, unto whom any such and distrain fo rent or fee-farm is or shall be due, and not paid at the time of testator in his his death, shall and may have an action of debt for all such lifetime. arrearages against the tenant or tenants that ought to have naid the said rent or fee-farms, so being behind in the life of their testator, or against the executors and administrators of the said tenants; and also furthermore, it shall be lawful to every such executor and administrator of any such person or persons unto whom such rent or fee-farm is or shall be due. and not paid at the time of his death as is aforesaid, to distrain for the arrearages of all such rents and fee-farms upon the lands, tenements, and other hereditaments, which were charged with the payment of such rents or fee-farms, and chargeable to the distress of the said testator, so long as the said lands, tenements, or hereditaments continue, remain, and be in the seisin or possession of the said tenant in demesne, who ought immediately to have paid the said rent or fee-farm so being behind to the said testator in his life, or in the seisin or possession of any other person or persons claiming the said lands, tenements, and hereditaments, only by and from the same tenant by purchase, gift, or descent, in like manner, and . form, as their said testator might or ought to have done in his lifetime, and the said executors and administrators shall. for the same distress, lawfully make avowry upon the matter aforesaid.

III. And further be it enacted by the authority aforesaid, that The husband's if any man which now hath or hereafter shall have, in the right remedy for ren of his wife, any estate in fee-simple, fee-tail, or for term of life, and in the life of or in any rents or fee.farms, and the same rents or fee-farms of his wife. now be or hereafter shall be due, behind, and unpaid in the said wife's life; then the said husband, after the death of his said wife, his executors and administrators, shall have an action of debt for the said arrearages against the tenant of the demesne that

ought to have paid the same, his executors or administra and also the said husband, after the death of his said wife, distrain for the said arrearages, in like manner and form might have done if his said wife had been then living, make avowry upon his matter as is aforesaid.

The remedy for a rent, the estate whereof dependeth upon another's life, being dead.

IV. And likewise it is further enacted by the authority: said, that if any person or persons which now have, or her shall have, any rents or fee-farms, for term of life or lives, (other person or persons, and the said rent or fee-farm no or hereafter shall be due, behind, and unpaid in the such person or persons for whose life or lives the estate said rent or fee-farm did depend or continue, and afte said person or persons do die, then he unto whom the rent or fee-farm was due in form aforesaid, his executi administrators shall and may have an action of debt a the tenant in demesne, that ought to have paid the when it was first due, his executors and administrators also distrain for the same arrearages upon such lands tenements out of which the said rents or fee-farms were ing and payable, in such like manner and form as he ous might have done, if such person or persons by whose the aforesaid estate in the said rents or fee-farms was mined and expired, had been in full life and not dead the avowry for the taking of the same distress to be ma manner and form aforesaid."

1 & 2 PHIL. & MARY, CAP. 12.

An act for the impounding of distresses.

Where distresses taken shall be impounded.

"For the avoiding of grievous vexations, exactions, tro and disorders in taking of distresses, and impounding of ca be it enacted by the authority of this present parliament from and after the first day of April next coming no di of cattle shall be driven out of the hundred, rape, waper or lathe, where such distress is or shall be taken, excep it be to a pound overt within the same shire, not above miles distant from the place where the said distress is t and that no cattle or other goods distrained or taken b of distress for any manner of cause at one time shall t pounded in several places, whereby the owner or own such distress shall be constrained to sue several replevi the delivery of the said distress so taken at one time: pain every person offending contrary to this act shall for the party grieved, for every such offence an hundred shi and treble damages.

How much may be taken for poundage. II. And be it further enacted by the authority afor that after the said first day of April, no person or poshall take for keeping in pound, impounding, or pound of any manner of distress, above the sum of four-pen any one whole distress that shall be so impounded; where less has been used, there to take less, upon the e pounds to be paid to the party grieved over and such money as he shall take above the sum of four-; any usage or prescription to the contrary in any wise hatanding.

And for the more speedy delivery of cattle taken by The sheriffs f distress, it is further enacted by the said authority, four deputies to very sheriff of shires, being no cities nor towns made make replevins shall at his first county day, or within two months next le hath received his patent of his office of sheriffwick, lepute, appoint, and proclaim in the shire-town within iliwick four deputies at the least, dwelling not above miles one distant from another, which said deputies so ated and proclaimed shall have authority in the sheriff's to make replevies and deliverance of such distresses, in manner and form as the sheriff may and ought to do; pain that every sheriff for every month that he shall uch deputy or deputies, shall forfeit for every such e five pounds; the one half of which forfeiture shall be king and queen's highness, her heirs and successors, her half to him that will sue for the same by bill, plaint, nation, or action of debt, in any the king and queen's of record, in which no essoin, protection, nor wager of iall be admitted.

12 CAR. II. CAP. 24.

t for taking away the courts of wards and liveries, and ures in capite, and by knight's service and purveyance, for settling a revenue upon his majesty in lieu thereof.

Vhereas it hath been found by former experience that purts of wards and liveries and tenures by knight's serither of the king or others, or by knight-service in capite cage in capite of the king, and the consequents upon ame have been much more troublesome, grievous and dicial to the kingdom, than they have been beneficial to ing: and whereas since the intermission of the said , which hath been from the twenty fourth of February n hundred and forty five, many persons have by will and wise, made disposal of their lands held by knight's serwhereupon divers questions might possibly arise, unless seasonable remedy be taken to prevent the same:" be it ed by the king our sovereign lord, with the asssent of ords and commons in parliament assembled, and by the ards and liberties, and all wardships, liveries, primer and outstorlemains, values and forfeitures of marriages, seisins, &c. rity of the same, and it is hereby enacted, that the court The court of ason of any tenure of the king's majesty, or of any other by taken away. it's service, and all mean rates, and all other gifts, grants, es, incident or arising, for or by reason of wardships. es, primer seisins, or ousterlemains, be taken away and arged, and are hereby enacted to be taken away and

tion &c. taken away.

Tenures by knight's service taken away.

Tenures by homage, escuage &c. discharged.

All tenures to be created by the king hereafter shall be free as common socage.

discharged, from the said twenty-fourth day of February on thousand six hundred and forty five; any law, statute, cur tom or usage to the contrary hereof in any wise notwith standing: and that all fines for alienations, seizures and par Fines for aliena. dons for alienations, tenure by homage, and all charge incident or arising, for or by reason of wardship, livery, prime seisin or ousterlemain, or tenure by knight's service, escuar and also aid pur file marrier, and pur fair fitz chivalier, and all other charges incident thereunto, be likewise taken awa and discharged, from the said twenty-fourth day of February one thousand six hundred and forty five, any law, states custom or usage to the contrary thereof in any wise notwith ing: and that all tenures by knight service of the king, ore any other person, and by knight's service in capite, and b socage in capite of the king, and the fruits and consequent thereof, happened or which shall or may hereafter happen of arise thereupon or thereby, be taken away and discharged, an law, statute, custom or usage to the contrary hereof in an , wise notwithstanding; and all tenures of any honours manors, lands, tenements or hereditaments, or any estate of any inheritance at the common law, held either of the king or of any other person or persons, bodies politick or corporate are hereby enacted to be turned into free and common socure to all intents and purposes, from the said twenty-fourth day of February one thousand six hundred and forty five, and shall be so construed, adjudged and deemed to be from the said twentyfourth day of February one thousand six hundred and forty five and for ever thereafter turned into free and common socage; any law, statute, custom or usage to the contrary hereof in any wise notwithstanding.

II. And that the same shall for ever hereafter stand and be discharged of all tenure by homage, escuage, voyage royal, and charges for the same, wardships incident to tenure by knight's service, and values and forfeitures of marriage, and all other charges incident to tenure by knight's service, and of and from uide pur file marrier, and aide pur fair fitz chivalier; any law, statute, usage or custom to the contrary hereof in any wise notwithstanding: and that all conveyances and devises of any manors, lands, tenements and hereditaments made since the said twenty-fourth day of February, shall be expounded to be of such effect, as if the same manors, lands, tenements and hereditaments had been then held and continued to be holden in free and common socage only; any law, statute, custom or usage to the contrary hereof in any wise notwithstanding.

IV. And be it further enacted by the authority aforesaid, that all tenures hereafter to be created by the king's majesty, be heirs or successors, upon any gifts or grants of any manors, lands, tenements or hereditaments, of any estate of inherit ance at the common law, shall be in free and common society and shall be adjudged to be in free and common socage only and not by knight's service or in capite, and shall be charged of all wardship, value and forfeiture of marriage livery, primer seisin, ousterlemain, aide pur fair fitz chivalier and pur file marrier, any law, statute, or reservation to the contrary notwithstanding.

V. Provided nevertheless, and be it enacted, that this act, or proviso for rents any thing herein contained, shall not take away nor be construed certain, heriots, to take away, any rents certain, heriots or suits of court belonging or incident to any former tenure now taken away or altered by virtue of this act, or other services incident or belonging to tenure in common socage, due or to grow due to the king's majesty or mean lords, or other private person, or the fealty and distresses incident thereunto; and that such relief shall be paid in respect of such rents as is paid in case of a death of a tenant in common socage.

VII. Provided always, and be it further enacted, that this act, Tenures in frank or any thing herein contained, shall not take away, or be con- almoign, copy of strued to take away, tenures in frank almoign, or to subject them honourary serto any greater or other services than they now are; nor to alter vices. or change any tenure by copy of court roll, or any services incident thereunto; nor to take away the honourary services of grand serjeantry, other than of wardship, marriage and value of forfeiture of marriage, escuage, voyages, royal and other charges incident to tenure by knight's service, and other than aide pur fair fitz chevalier and aide pur file marrier.

17 CAR. II. CAP. 7.

An act for a more speedy and effectual proceeding upon distresses and avowries for rents.

"Forasmuch as the ordinary remedy for arrearages of rents is by distress upon the lands chargeable therewith; and yet nevertheless, by reason of the intricate and dilatory proceedings upon replevins, that remedy is become ineffectual:"

II. For remedy thereof, it is enacted, that whensoever any plaintiff in replevin shall be nonsuit before issue joined in any suit of replevin by plaint or writ lawfully returned, removed, or depending, in any of the king's courts at Westminster, that the defendant making a suggestion in nature of an avowry or cognizance for such rent, to ascertain the court of the cause of distress, the court upon his prayer shall award a writ to the sheriff of the county where the distress was taken, to inquire by the oaths of twelve good and lawful men of his bailiwick, touching the sum in arrear at the time of such distress taken, and the value of the goods or cattle distrained; and thereupon notice of fifteen days shall be given to the plaintiff or his attorney in court of the sitting of such inquiry; and thereupon the sheriff shall inquire of the truth of the matters contained in such writ, by the oaths of twelve good and lawful men of his county; and upon the return of such inquisition, the defendant shall have judgment to recover against the plaintiff the arrearages of such rent, in case the goods or cattle distrained shall amount unto that value, and in case they shall not amount to that value, then so much as the value of the said goods and cattle so distrained

shall amount unto, together with his full costs of suit shall have execution thereupon by fieri facias or eleg-otherwise as the law shall require; and in case such plashall be nonsuit after cognizance or avowry made, and joined, or if the verdict shall be given against such plasten the jurors that are impanneled or returned to inquire the sum of the arrears, and the value of the gocattle distrained; and thereupon the avowant, or he that a cognizance, shall have judgment for such arrearages, much thereof as the goods or cattle distrained amount together with his full costs, and shall have execution for same by fieri facias or elegit or otherwise as the law require.

III. And be it further enacted by the authority afor that if judgment in any of the courts aforesaid be given demurrer for the avowant, or him that maketh cognisant any rent, the court shall, at the prayer of the defen award a writ to inquire of the value of such distress; upon the return thereof judgment shall be given fo avowant, or him that makes cognizance as aforesaid, for arrears alleged to be behind in such avowry or cognisan the goods or cattle so distrained shall amount to that v and in case they shall not amount to that value, then i much as the said goods or cattle so distrained amount together with his full costs of suit, and shall have like et ion as aforesaid.

IV. Provided always, and be it enacted, that in all aforesaid, where the value of the cattle distrained as afor shall not be found to be to the full value of the arrears trained for, that the party to whom such arrears were his executors or administrators, may from time to time train again for the residue of the said arrears. (Extend Wales and the counties palatine, by 19 Car. 2, c. 5.)

2 WILL. & M. SESS. I. CAP. 5.

An act for enabling the sale of goods distrained for recase the rent be not paid in a reasonable time.

"Whereas the most ordinary and ready way for recof arrears of rent is by distress, yet such distresses not to be sold, but only detained as pledges for enforcing the ment of such rent, the persons distraining have little by thereby;" for the remedy whereof,

oods disained for rent ay be apaised and sold.

II. Be it enacted and ordained by the king's and qu most excellent majesties, by and with the advice and coi of the lords spiritual and temporal, and commons, in this sent parliament assembled, and by the authority of the a that from and after the first day of June in the year of Lord one thousand six hundred and ninety, that where goods or chattels shall be distrained for any rent reserved.

pon any demise, lease, or contract whatsoever, and the t or owner of the goods so distrained shall not within ays next after such distress taken, and notice thereof the cause of such taking) left at the chief mansion or other most notorious place on the premises charged the rent distrained for, replevy the same, with sufficient ty to be given to the sheriff according to law, that then th case, after such distress and notice as aforesaid and tion of the said five days, the person distraining shall may, with the sheriff or under-sheriff of the county, or the constable of the hundred, parish, or place, where distress shall be taken, (who are hereby required to be ; and assisting therein) cause the goods and chattels so ined to be appraised by two sworn appraisers (whom sheriff, under-sheriff, or constable are hereby empowered ear) to appraise the same truly, according to the best of understandings; and after such appraisement shall and awfully sell the goods and chattels so distrained for the rice can be gotten for the same, towards satisfaction of nt for which the said goods and chattels shall be disd, and of the charges of such distress, appraisement, and leaving the overplus (if any) in the hands of the said f, under-sheriff, or constable, for the owner's use.

"And whereas no sheaves or cocks of corn, loose or in Corn loose, & traw, or hay in any barn, or granary, or on any hovel, and sold. or rick, can by the law be distrained, or otherwise ad for rent, whereby landlords are oftentimes cousened eceived by their tenants, who sell their corn, grain, ay to strangers, and remove the same from the premises eable with such rent, and thereby avoid the payment same;" be it further enacted by the authority aforesaid, or remedying the said practice and deceit, it shall and from and after the said first day of June, be lawful to or any person or persons having rent arrear and due any such demise, lease, or contract as aforesaid, to and secure any sheaves or cocks of corn, or corn loose the straw, or hay lying or being in any barn or ry, or upon any hovel, stack, or rick, or otherwise upon art of the land or ground charged with such rent, and k up or detain the same in the place where the same be found, for or in the nature of a distress, until the shall be replevied upon such security to be given as aid; and in default of replevying the same as aforesaid, the time aforesaid, to sell the same after such apment thereof to be made; so as nevertheless such corn, or hay so distrained as aforesaid, be not removed by rson or persons distraining to the damage of the owner f out of the place where the same shall be found and but be kept there (as impounded) until the same shall levied, or sold in default of replevying the same within ne aforesaid.



manned, recover his mit spinst the steel of breach, say or t the goods distrimed, i have come to his use V. Provided always BRY SUCH CESTIES SUC or colour of this pres and due, where in tr or persons distrainis Names. OF Tight, SOC then the owner of as aforesaid, his ex by action of trespa the person or pers his or their execut value of the goods with full costs of

As act for the a

All greats and conveyances to terants.

IX. And be that from and stronguent; of size. of sult in the soul of sult in the soul of sult in the su wise, of any n der of any me all intents and of any such shall be issu particular est mar be expe

by him for that purpose lawfully impowered, within the space of five days next ensuing such conveying away or carrying off such goods or chattels as aforesaid, to take and seize such goods and chattels, wherever the same shall be found, as a distress for the said arrears of such rent; and the same to sell or otherwise dispose of, in such manner, as if the said goods and chattels had actually been distrained by such lessor or landlord in and upon such demised premises for such arrears of rent; any law, custom, usage to the contrary in any wise notwithstanding.

Proviso.

III. Provided nevertheless, that nothing in this act contained shall extend, or be construed to extend, to impower such lessor or landlord to take or seize goods or chattels as a distres for arrears of rent which shall be sold bond fide, and for a valuable consideration, before such seizure made; any thing herein contained to the contrary notwithstanding.

V. And it is hereby further enacted and declared by the authority aforesaid, that all distresses hereby impowered to be made as aforesaid, shall be liable to such sales, and in such manner, and the monies arising by such sales to be distributed in like manner, as by an act made in the second year of the reigns of their late Majesties King William and Queen Mary. intituled, 'An act for enabling the sale of goods distrained for rent, in case the rent be not paid in reasonable time, is in

that behalf directed and appointed.

VI. "And whereas tenants pur auter vie and lesses upon a lease for for years, or at will, frequently hold over the tenements to them demised after the determination of such leases; and whereas after the determination of such, or any other leases, no distress can by law be made for any arrears of rent that grew due on such respective leases before the determination thereof;" it is hereby further enacted by the authority aforesaid, that from and after the first day of May one thousand seven hundred and ten, it shall and may be lawful for any person or persons having any rent in arrear or due upon any lease for life or lives, or for years, or at will, ended or determined, to distrain for such arrears, after the determination of the said respective leases, in the same manner as they might have done, if such lease or leases had not been ended or determined.

VII. Provided, that such distress be made within the space of six calendar months after the determination of such lease, end of the lease, and during the continuance of such landlord's title or interest, and during the possession of the tenant from whom such

> VIII. Provided always, and it is hereby enacted and declared by the authority aforesaid, that nothing in this act contained shall extend or be construed to extend to let, hinder, or prejudice her majesty, her heirs, or successors, in the levying, recovering, or seizing any debts, fines, penalties, or forfeitures, that are or shall be due, payable, or

Rent in arrear life, &c. expired, may be distrained for after the determination of the lease.

Distress to be within six months after the and during the landlord's title, arrears become due. and tenant's possession.
This act shall not hinder the levying of any debts, fines, &c. due to the crown.

relating to the Law of Distress.

answerable to her majesty, her heirs, or successors; but that it shall and may be lawful for her majesty, her heirs, and successors, to levy, recover, and seize such debts, fines, penalties, and forfeitures in the same manner as if this act had never been made; any thing in this act contained to the contrary thereof in any wise notwithstanding.

4 GEO. II. CAP. 28.

An act for the more effectual preventing frauds committed by tenants, and for the more easy recovery of rents, and renewal of leases.

" For securing the lessors and land-owners their just rights, Persons ho and to prevent frauds frequently committed by tenants," be it over lands, enacted by the King's most Excellent Majesty, by and with after expira the advice and consent of the lords spiritual and temporal, double the and commons in this present parliament assembled, and by yearly valu the authority of the same, that in case any tenant or tenants for any term of life, lives, or years, or other person or persons, who are or shall come into possession of any lands, tenements, or hereditaments, by, from, or under, or by collusion with such tenant or tenants, shall wilfully hold over any lands, tenements, or hereditaments, after the determination of such term or terms, and after demand made, and notice in writing given, for delivering the possession thereof, by his or their landlords or lessors, or the person or persons to whom the remainder or reversion of such lands, tenements, or hereditaments shall belong, his or their agent or agents thereunto hwfully authorized, then and in such case such person or persons, so holding over, shall, for and during the time he. she, and they shall so hold over, or keep the person, or persons entitled out of possession of the said lands, tenements, and hereditaments, as aforesaid, pay to the person or persons so kept out of possession, their executors, administrators, or assigns, at the rate of double the yearly value of the lands, tenenements and hereditaments so detained, for so long a time as the same are detained, to be recovered in any of his majesty's courts of record, by action of debt, whereunto the defendant or defendants shall be obliged to give special bail, against the recovering of which said penalty there shall be no relief in equity.

. V. "And whereas the remedy for recovering rents seck, Method of vents of assize, and chief rents are tedious and difficult." be covering se it therefore enacted by the authority aforesaid, that from rents, &c. and after the twenty-fourth day of June one thousand seven hundred and thirty one, all and every person or persons, bodies politic and corporate, shall and may have the like remedy by distress, and by impounding and selling the same in cases of rent-seck, rents of assize, and chief rents, which have been duly answered or paid for the space of three years, within the space of twenty years before the first day of

this present session of parliament, or shall be hereafter created, as in case of rent reserved upon lease; any law or usage to the contrary notwithstanding.

Chief leases may be renewed without surrendering all the under-leases.

VI. " And whereas many persons hold considerable estates by leases for lives or years, and lease out the same in parcels to several under-tenants: and whereas many of those leases cannot by law be renewed without a surrender of all the under-leases derived out of the same, so that it is in the power of any such under-tenants to prevent or delay the renewing of the principal lease, by refusing to surrender their under-leases, notwithstanding they have covenanted so to do, to the great prejudice of their immediate landlords, the first lessees:" for preventing such incorveniences, and for making the renewal of leases more easy for the future, be it enacted by the authority aforesaid, that in case any lease shall be duly surrendered in order to be renewed, and a new lease made and executed by the chief landlord or landlords, the same new lease shall, without a surrender of all or any of the under-leases, be as good and valid to all intents and purposes as if all the under-leases derived thereout had been likewise surrendered at or before the taking of such new lease; and all and every person and persons in whom any estate for life or lives or for years shall from time to time be vested by virtue of such new lease, and his, her, and their executors and administrators, shall be entitled to the rents, covenants, and duties, and have like remedy for recovery thereof, and the under-lessees shall hold and enjoy the messuages, lands, and tenements, in the respective underleases comprised, as if the original leases, out of which the respective under-leases are derived, had been still kept on foot and continued, and the chief landlord and landlords shall have and be entitled to such and the same remedy, by distress or entry in and upon the messuages, lands, tenements, and hereditaments comprised in any such under-lease, for the rents and duties reserved by such new lease, so far as the same exceed not the rents and duties reserved in the lease out of which such under-lease was derived, as they would have had in case such former lease had been still continued, or as they would have had in case the respective under-leases had been renewed under such new principal lease; any law, custom, or usage to the contrary hereof notwithstanding.

11 GEO. II. CAP. 19.

An act for the more effectual securing the payment of rents and preventing frauds by tenants.

Landlords may distrain and sell goods fraudulently carried off the premises within thirty days.

"Whereas the several laws heretofore made for the better security of rents, and to prevent frauds committed by tenants, have not proved sufficient to obtain the good ends and purposes designed thereby, but rather the fraudulent practices of tenants, and the mischief intended by the said acts to be prevented have of late years increased, to the great loss and damage of their lessors or landlords;" for remedy whereof, may it please your most excellent majesty that it may be enacted, and be it enacted by the King's most Excellent Mejesty, by and with the advice and consent of the lords spritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that from and after the twenty-fourth day of June, in the year of our Lord one thousand seven hundred and thirty eight, in case any tenant or tenants, lessee or lessees for life or lives, term of years, at will, sufferance, or otherwise, of any messuages lands, tenements, or hereditaments, upon the demise or holding whereof any rent is or shall be reserved, due, or made payable, shall fraudulently or clandestinely convey away, or carry off or from such premises his, her, or their goods or chattels, to prevent the landlord or lessor, landlords or lessors, from distraining the same for arrears of rent so reserved, due, or made payable; it shall and may be lawful to and for every landlord or lessor, landlords or lessors, within that part of Great Britain called England, dominion of Wales, or the town of Berwick-upon-Tweed, or any person or persons by him, her, or them for that purpose lawfully empowered, within the space of thirty days next ensuing such conveying away or carrying off such goods or chattels as aforesaid, to take and seize such goods and chattels, wherever the same shall be found, as a distress for the said arrears of rent; and the same to sell, or otherwise dispose of, in such manner as if the said goods and chattels had actually been distrained by such lessor or landlord, lessors or landlords, in and upon such premises for such arrears of rent; any law, custom, or usage to the contrary in any wise notwithstanding.

II. Provided always, that no landlord or lessor, or other unless sold person, intitled to such arrears of rent, shall take or seize any any person : such goods or chattels as a distress for the same, which shall fraud. be sold bona fide, and for a valuable consideration, before such seizure made, to any person or persons not privy to such fraud as aforesaid; any thing herein contained to the contrary notwithstanding.

III. And to deter tenants from such fraudulently conveying Penalty on away their goods and chattels, and others from wilfully aiding said fraud o or assisting therein, or concealing the same; be it further sisting there enacted by the authority aforesaid, that from and after the said twenty-fourth day of June, if any such tenant or lessee shall fraudulently remove and convey away his or her goods or chattels as aforesaid, or if any person or persons shall wilfully and knowingly aid or assist any such tenant or lessee in such Fraudulent conveying away or carrying off of any part of his or her goods or chattels, or in concealing the same, all and every person and persons so offending shall forfeit and pay to the Landlord or landlords, lessor or lessors, from whose estate such seconds and chattels were fraudulently carried off as aforesaid. double the value of the goods by him, her, or them respectively

carried off or concealed as aforesaid, to be recovered b of debt in any of his majesty's courts of record at minster, or in the courts of session in the counties pal Chester, Lancaster, or Durham respectively, or in the of grand sessions in Wales, wherein no essoin, pre or wager of law shall be allowed, nor more than one

If the goods exceed not the value of £50 recourse to two justices.

lance. IV. Provided always, and be it enacted by the a aforesaid, that where the goods and chattels so frau landlord to have carried off or concealed, shall not exceed the value pounds, it shall and may be lawful for the landlord lords, from whose estate such goods or chattels were n his, her, or their bailiff, servant, or agent, in his, their behalf, to exhibit a complaint in writing again offender or offenders, before two or more justices of the of the same county, riding or division of such county, near the place where such goods and chattels were n or near the place where the same were found, not bei rested in the lands or tenements whence such goo removed; who may summon the parties concerned, the fact, and all proper witnesses upon oath, or if a witness be one of the people called quakers, upon affi required by law; and in a summary way determine. such person or persons he guilty of the offence with w or they are charged; and to inquire in like manner value of the goods and chattels by him, her, or them tively so fraudulently carried off or concealed as af and upon full proof of the offence, by order under the and scals, the said justices of the peace may and shall the offender or offenders to pay double the value of t goods and chattels to such landlord or landlords, his bailiff, servant, or agent, at such time as the said justic appoint; and in case the offender or offenders, having of such order, shall refuse or neglect so to do, may ar by warrant under their hands and seals, levy the same tress and sale of the goods and chattels of the offe offenders; and for want of such distress, may com offender or offenders to the house of correction, the kept to hard labour without bail or mainprize for the six months, unless the money so ordered to be paid a said shall be sooner satisfied.

Appeal from them to the

V. Provided also, that it shall and may be lawful person, who thinks himself aggrieved by such order quarter sessions, said two justices, to appeal to the justices of the peace next general or quarter sessions to be held for th county, riding or division of such county, who may a hear and determine such appeal, and give such costs t party as they shall think reasonable, whose detern therein shall be final.

The two justices' order on such executed.

VI. Provided also, that where the party appealir appeal net to be enter into a recognizance with one or two sufficient st

sureties in double the sum so ordered to be paid, with condition to appear at such general or quarter sessions, the order of the said two justices shall not be executed against him in the meantime.

VII. And be it further enacted by the authority aforesaid, Landlords may that where any goods or chattels fraudulently or clandestinely break open conveyed or carried away by any tenant or tenants, lessee or houses to seize issees, his, her, or their servant or servants, agent or agents, lently concealed or other person or persons aiding or assisting therein, shall therein. be put, placed, or kept in any house, barn, stable, out-house, yard, close, or place locked up, fastened, or otherwise secured, so as to prevent such goods or chattels from being taken and seized as a distress for arrears of rent; it shall and may be hwful for the landlord or landlords, lessor or lessors, his, her, or their steward, bailiff, receiver, or other person or persons empowered to take and seize, as a distress for rent, such goods and chattels (first calling to his, her, or their assistance the constable, headborough, borsholder, or other peace-officer of the hundred, borough, parish, district, or place, where the sime shall be suspected to be concealed, who are hereby re-faired to aid and assist therein; and in case of a dwellinghouse, oath being also first made before some justice of the peace of a reasonable ground to suspect that such goods or chattels are therein) in the day to break open and enter into such house, barn, stable, out-house, yard, close and place, and to take and seize such goods and chattels for the said arrears of rent, as he, she, or they might have done by virtue this or any former act, if such goods and chattels had been

put in any open field or place. VIII. And be it further enacted by the authority aforesaid, And may disthat from and after the twenty-fourth day of June which shall cattle on the be in the year of our Lord one thousand seven hundred and premises for thirty eight, it shall and may be lawful to and for every lessor arrears of rent. be landlord, lessors or landlords, or his, her, or their steward, balliff, receiver, or other person or persons empowered by him, her, or them, to take and seize, as a distress for arrears of rent, any cattle or stock of their respective tenant or benants, feeding or depasturing upon any common, appendant be appurtenant, or any ways belonging to all or any part of the premises demised or holden; and also to take and seize all Il sorts of corn and grass, hops, roots, fruits, pulse, or other product whatsoever, which shall be growing on any part of the estates so demised or holden; as a distress for arrears of rent; and the same to cut, gather, make, cure, carry and lay ap, when ripe, in the barns, or other proper place on the premises so demised or holden, and in case there shall be no barn be proper place on the premises so demised or holden, then in any other barn, or other proper place, which such lessor or **andlord**, lessors or landlords, shall hire or otherwise procure

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same, towards satisfaction of the rent for which such distress shall have been taken, and of the charges of such distress, appraisement and sale, in the same manner as other goods and chattels may be seized, distrained, and disposed of; and the appraisement thereof to be taken when cut, gathered, cured, and made, and not before.

Tenants to have notice of the place where the distress is lodged.

Distress of corn. &c. to cease if rent be paid before it be cut.

IX Provided always, that notice of the place where the goods and chattels so distrained shall be lodged or deposited, shall, within the space of one week after the lodging or depositing thereof in such place, be given to such lessor or tenant, or left at the last place of his or her abode; and that if after any distress for arrears of rent so taken, of corn, grass, hops, roots, fruits, pulse, or other product, which shall be growing as aforesaid, and at any time before the same shall be ripe and cut, cured or gathered, the tenant or lessee, his or her executors, administrators, or assigns shall pay, or cause to be paid to the lessor or landlord, lessors or landlords, for whom such distress shall be taken, or to the steward or other person usually employed to receive the rent of such lesser or lessors, landlord or landlords, the whole rent which shall be then in arrear, together with the full costs and charges of making such distress, and which shall have been occasioned thereby, that then, and upon such payment, or lawful tender thereof actually made, whereby the end of such distress will be fully answered, the same and every part thereof shall cease; and the corn, grass, hops, roots, fruits, pulse, or other product so distrained, shall be delivered up to the lessee or tenant, his or her executors, administrators, or assigns; any thing herein before contained to the contrary notwithstanding.

Distress may be on the premises.

X. "And whereas great difficulties and inconveniences fresecured and sold quently arise to landlords and lessors, and other persons taking distresses for rent, in removing the goods and chattels or stock distrained off the premises, in cases where by law they may not be impounded and secured thereupon; and also to the tenants themselves many times, by the damage unavoidably done to such goods and chattels or stock in the removal thereof;" be it enacted by the authority aforesaid, that from and after the said twenty-fourth day of June one thousand seven hundred and thirty eight, it shall and may be lawful to and for any person or persons lawful taking any distress for any kind of rent to impound, or otherwise secure the distress so made, of what nature or kind soever it may be, in such place, or on such part of the premises chargeable with the rent, as shall be most fit and convenient for the impounding and securing such distress; and to appraise, sell and dispose of the same upon the premises, in like manner, and under the like directions and restraints to all intents and purposes, as any person taking a distress for rent may now do off the premises, by virtue of an act made in the second year of the reign of King William and Queen Mary, intituled "An act for enabling the sale of goods distrained for rent,

relating to the Law of Distress.

case the rent be not paid in a reasonable time;" or of one other act made in the fourth year of his present majesty, intituled, "An act for the more effectual preventing frauds committed by tenants, and for the more easy recovery of rents and renewal of leases;" and that it shall and may be lawful to and for any person or persons whatsoever, to go and come to and from such place or part of the said premises, where any distress for rent shall be impounded and secured as aforesaid, in order to view, appraise, and buy, and also in order to carry of or remove the same on account of the purchasers thereof; and that if any pound-breach or rescous shall be made of any mods and chattels, or stock distrained for rent, and impounded or otherwise secured by virtue of this act, the person or persons aggrieved thereby shall have the like remedy s in cases of pound-breach or rescous is given and provided by the said statute.

XVIII. " And whereas great inconveniences have happened Tenants h and may happen to landlords whose tenants have power to premises a determine their leases by giving notice to quit the premises the time the notify for by them holden, and yet refusing to deliver up the possession, ting them. when the landlord hath agreed with another tenant for the pay double same;" be it further enacted by the authority aforesaid, that rent. from and after the said twenty-fourth day of June one thoucand seven hundred and thirty eight, in case any tenant or tenants, shall give notice of his, her, or their intention to quit the premises by him, her, or them holden, at a time mentioned in such notice, and shall not accordingly deliver up the possession thereof at the time in such notice contained; that then the said tenant or tenants his, her, or their executors or administrators, shall from thenceforward pay to the landlord or landlords, lessor or lessors, double the rent or sum due, which he, she, or they should otherwise have paid; to be levied, sued for, and recovered at the same times, and in the same manner, as the single rent or sum, before the giving such notice, could be levied, sued for, or recovered; and such double rent or sum shall continue to be paid during all the time such tenant or tenants shall continue in possession as aforesaid.

XIX. "And whereas it hath sometimes happened, that upon a distress made for rent justly due, the directions of the statute made in the second year of the reign of King William and Queen Mary, intituled, "An act for enabling the sale of goods distrained for rent, in case the rent be not paid within a reasonable time," have not been strictly pursued, but through mistake or inadvertency of the landlord or other person entitled to such rent and distraining for the same, or of the bailiff or agent of such landlord or other person, some irregularity or tortious act hath been afterwards done in the disposition of the distress so seized or taken as aforesaid; for which irregularity or tortious act the party distraining hath been deemed a trespasser, ab initio, and in an action brought

Distresses for rent not unlawful, &c. for any irregularity in the disposition of them.

against him as such the plaintiff hath been entitled to recover. and has actually recovered, the full value of the rent, for which such distress was taken; and whereas it is a very great hardship upon landlords and other persons entitled to rents, that a distress duly made should be thus in effect avoided for any subsequent irregularity;" be it enacted by the authority aforesaid, that from and after the said twenty-fourth day of June in the year of our Lord one thousand seven hundred and thirty eight, where any distress shall be made for any kind of rent justly due, and any irregularity or unlawful act shall be afterwards done by the party or parties distraining or by his, her or their agents; the distress itself shall not be therefore deemed to be unlawful, nor the party or parties making it to be deemed a trespasser or trespassers ab initio; but the party or parties aggrieved by such unlawful act or irregularity shall or may recover full satisfaction for the special damage he, she, or they shall have sustained thereby, and no more, in an action of trespass, or on the case, at the election of the plaintiff or plaintiffs: provided always, that where the plaintiff or plaintiffs shall recover in such action, he, she or they shall be paid his, her or their full costs of suit, and have all the like remedies for the same as in other cases of costs.

Nor tenants to recover by action on tender of amends.

XX. Provided nevertheless, that no tenant or tenants, lessee or lessees, shall recover in any action for any such unlawful act or irregularity as aforesaid, if tender of amends hath been made by the party or parties distraining his, her, or their agent or agents, before such action brought.

In actions against persons the defendants may plead the general issue, &c.

XXI. And be it further enacted by the authority aforesaid, that from and after the said twenty-fourth day of June entitled to rents, one thousand seven hundred and thirty eight, in all actions of trespass or upon the case to be brought against any person or persons entitled to rents or services of any kind, his, her, or their bailiff or receiver, or other person or persons, relating to any entry by virtue of this act, or otherwise, upon the premises chargeable with such rents or services, or to any distress or seizure, sale or disposal of any goods or chattels thereupon, it shall and may be lawful to and for the defendant or defendants in such actions to plead the general issue, and give the special matter in evidence; any law or usage to the contrary notwithstanding: and in case the plaintiff or plaintiffs in such action shall become nonsuit, discontinue his, her, or their action, or have judgment against him, her or them, the defendant or defendants shall recover double costs of suit.

Defendants in replevin to avow, &c. that the plaintiff held the premises at a certain rent.

XXII. "And whereas great difficulties often arise in making avowries or conizance upon distresses for rent, quit rents, reliefs, heriots, and other services;" he it further enacted by the authority aforesaid, that from and after the said twentyfourth day of June one thousand seven hundred and thirty eight, it shall and may be lawful to and for all defendants in replevin to avow or make conizance generally, that the plaintiff in replevin, or other tenant of the lands and tenewhereon such distress was made, enjoyed the same under ; or demise at such a certain rent, during the time 1 the rent distrained for accrued, which rent was then ll remains due; or that the place where the distress en was parcel of such certain tenements, held of such , lordship or manor for which tenements the rent, or other seizure distrained for was at the time of such and still remains due without setting forth the grant, demise, or title, of such landlord or landlords, lessor ors, honour or honours, of such manors; any law or the contrary notwithstanding: and if the plaintiff or is in such action shall become nonsuit, discontinue his, their action, or have judgment given against him, her, 1, the defendant or defendants in such replevin shall double double costs of suit.

II. And to prevent vexatious replevins of distresses To preventvex or rent, be it enacted by the authority aforesaid, that tious replevins id after the said twenty-fourth day of June one thousand undred and thirty eight, all sheriffs, and other officers authority to grant replevins, may and shall in every a of a distress for rent, take in their own names, from intiffs, and two resposible persons as sureties, a bond ole the value of the goods distrained, (such value to be ined by the oath of one or more credible witness or es not interested in the goods or distress, which oath rson granting such replevin is hereby authorized and d to administer) and conditioned for prosecuting the th effect and without delay, and for duly returning the and chattels distrained in case a return shall be awarded,

any deliverance be made of the distress; and that such Replevin bond or other officer as aforesaid, taking any such bond, may be assigne : the request and costs of the avowant or person making ice, assign such bond to the avowant or person aforey indorsing the same, and attesting it under his hand al in the presence of two or more credible witnesses, may be done without any stamp, provided the assigno indorsed be duly stamped before any action brought pon; and if the bond so taken and assigned be forfeited, want, or person making conizance, may bring an action cover thereupon in his own name; and the court such action shall be brought may by a rule of the same give such relief to the parties upon such bond, as may eable to justice and reason; and such rule shall have

56 GEO. III. CAP. 50.

ture and effect of a defeazance to such bond.

to regulate the sale of farming stock taken in execution.

hereas it is expedient that the execution of legal pro- No sheriff or rould be so regulated, as to be consistent with good other officer shall sell or carry off from any lands any straw, chaff, or turnips in any case, nor hay or other produce contrary to the covenants.

husbandry, and the effect and intent of covenants and agreements entered into between the owners and occupiers of land let to farm;" be it enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal and commons, in this present parliament assembled, and by the authority of the same, that no sheriff or other officer in England or Wales shall, by virtue of any process of any court of law, carry off or sell, or dispose of for the purpose of being carried off, from any lands let to farm, any straw threshed or unthreshed, or any straw of crops growing, or any chaff, colder, or any turnips, or any manure, compost, ashes, or seaweed, in any case whatsoever; nor any hay, grass or grasses, whether natural or artificial, nor any tare or vetches, nor any roots or vegetables, being produce of such lands, in any case where, according to any covenant or written agreement, entered into and made for the benefit of the owner or landlord of any farm, such hay, grass or grasses, tares and vetches, roots or vegetables, ought not to be taken of or withholden from such lands, or which, by the tenor or effect of such covenants or agreements, ought to be used or expended thereon, and of which covenants or agreements. such sheriff or other officer shall have received a written notice before he shall have proceeded to sale.

Tenant to give notice of the existence of covenants,

and sheriff to give notice to the owner or landlord.

II. And be it further enacted, that the tenant or occupier of any lands let to farm, against whose goods any process of law shall issue, whereby such goods may be taken and sold, shall on having knowledge of such process, give a written notice to the sheriff or other officer executing the same, of such covenants or agreements whereof he or she shall have knowledge, and which may relate to and regulate, or are intended to regulate the use and expenditure of the crops or produce grown or growing thereon, and also of the name and residence of the owner or landlord of such lands: and such sheriff or other officer shall forthwith, on executing such process, and before any sale shall have been proceeded in, send a notice by the general post to the owner or landlord of such lands, in all cases where such owner or landlord shall be resident in any part of this united kingdom, and shall have been made known to and ascertained by such sheriff or other officer, and also to the known steward or agent of such landlord or owner, in respect of such lands, stating to such owner, landlord and agent, the fact of possession having been taken of any crops or produce thereinbefore mentioned; and such sheriff or other officer shall, in all cases of the absence or silence of such landlord or owner, or his or her agent, postpone and delay the sale of such crops or produce, until the latest day he lawfully can or may appoint for such sale.

Sheriff may dispose of produce, subject to sheriff or other officer executing such process, may dispose of an agreement to any crops or produce hereinbefore mentioned, to any person expend it on the or persons, who shall agree in writing with such sheriff or land

relating to the Law of Distress.

answerable to her majesty, her heirs, or successors; but that it shall and may be lawful for her majesty, her heirs, and successors, to levy, recover, and seize such debts, fines, penalties, and forfeitures in the same manner as if this act had never been made; any thing in this act contained to the contrary thereof in any wise notwithstanding.

4 GEO. II. CAP. 28.

An act for the more effectual preventing frauds committed by tenants, and for the more easy recovery of rents, and renewal of leases.

"For securing the lessors and land-owners their just rights, Persons ho and to prevent frauds frequently committed by tenants," be it over lands, enacted by the King's most Excellent Majesty, by and with after expira of leases, t the advice and consent of the lords spiritual and temporal, double the and commons in this present parliament assembled, and by yearly valu the authority of the same, that in case any tenant or tenants for any term of life, lives, or years, or other person or persons, who are or shall come into possession of any lands, tenements, or hereditaments, by, from, or under, or by collusion with such tenant or tenants, shall wilfully hold over any lands, tenements, or hereditaments, after the determination of such term or terms, and after demand made, and notice in writing given, for delivering the possession thereof, by his or their landlords or lessors, or the person or persons to whom the remainder or reversion of such lands, tenements, or hereditaments shall belong, his or their agent or agents thereunto lawfully authorized, then and in such case such person or persons, so holding over, shall, for and during the time he. she, and they shall so hold over, or keep the person, or persons entitled out of possession of the said lands, tenements, and hereditaments, as aforesaid, pay to the person or persons so kept out of possession, their executors, administrators, or assigns, at the rate of double the yearly value of the lands, tenenements and hereditaments so detained, for so long a time as the same are detained, to be recovered in any of his majesty's courts of record, by action of debt, whereunto the defendant or defendants shall be obliged to give special bail, against the recovering of which said penalty there shall be no relief in equity.

. V. "And whereas the remedy for recovering rents seck, Method of rents of assize, and chief rents are tedious and difficult," be covering se it therefore enacted by the authority aforesaid, that from rents, &c. and after the twenty-fourth day of June one thousand seven hundred and thirty one, all and every person or persons, bodies politic and corporate, shall and may have the like remedy by distress, and by impounding and selling the same in cases of rent-seck, rents of assize, and chief rents, which have been duly answered or paid for the space of three years, within the space of twenty years before the first day of

57 GEO. III. CAP. 93.

An act to regulate the costs of distresses levied for payment of small debts.

No person making any distress for rent. where the sum due shall not exceed 201., to take other charges than mentioned in the schedule annexed, nor to charge for any act not done.

"Whereas divers persons acting as brokers, and distraining on the goods and chattels of others, or employed in the course of such distresses, have of late made excessive charges, to the great oppression of poor tenants and others; and it is expedient to check such practices:" be it therefore enacted, by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal and commons, in this present parliament assembled, and by the authority of the same, that from and after the passing of this act, no person whatsoever making any distress for rent, where the sum demanded and due shall not exceed the sum of twenty pounds for and in respect of such rent, nor any person whatsoever employed in any manner in making such distress, or doing any act whatsoever in the course of such distress, or for carrying the same into effect, shall have, take, or receive, out of the produce of the goods or chattels distrained upon and sold, or from the tenant distrained on, or from the landlord, or from any other person whatsoever, any other or more costs and charges for and in respect of such distress, or any matter or thing done therein, than such as are fixed and set forth in the schedule hereunto annexed and appropriated to each act, which shall have been done in the course of such distress; and no person or persons whatever shall make any charge whatsoever for any act, matter or thing mentioned in the said schedule, unless such act shall have been really done.

Party aggrieved by any such practice, may of the peace.

II. And be it further enacted, that if any person or persons whatsoever shall in any manner levy, take, or receive apply to a justice from any person or persons whatsoever, or retain or take from the produce of any goods sold for the payment of such rent. any other or greater costs and charges than are mentioned and set down in the said schedule, or make any charge whatsoever for any act, matter or thing mentioned in the said schedule, and not really done, it shall be lawful for the party or parties aggrieved by such practices to apply to any one justice of the peace for the county, city, town, and acting for the division where such distress shall have been made or in any manner proceeded in, for the redress of his or their grievance so occasioned; whereupon such justice shall summon the person or persons complained of, to appear before him at a reasonable time to be fixed in such summons; and such justice shall examine into the matter of such complaint by all legal ways and means, and also hear, in like manner, the defence of the person or persons complained of; and if it shall appear to such justice, that the person or persons complained of shall have levied, taken, received, or had other and greater costs and charges than are mentioned or fixed in the schedule here-

Justice may adjudge treble the amount of monies unlawfully taken to be paid with costs, which may be levied by distress.

mnexed, or made any charge for any matter or thing med in the said schedule, such act, matter or thing not been really done, such justice shall order and adjudge the amount of the monies so unlawfully taken, to be y the person or persons so having acted to the party or who shall thus have preferred his, her or their comthereof, together with full costs; and in case of nonnt of any monies or costs so ordered and adjudged to I, such justice shall forthwith issue his warrant to levy ne by distress and sale of the goods and chattels of the or parties ordered to pay such monies or costs, renderoverplus (if any) to the owner or owners, after the nt of the charges of such distress and sale; and in case h distress can be had, such justice shall, by warrant his hand, commit the party or parties to the common r prison within the limits of the jurisdiction of such there to remain until such order or judgment be d.

And be it further enacted, that it shall be lawful for Justices may istices, at the request of the party complaining or coml against, to summon all persons as witnesses, and to ster an oath to them touching the matter of such comor defence against it; and if any person or persons so Refusal to oned, shall not obey such summons without any reason- attend. lawful excuse, or refuse to be examined upon oath, or aker upon solemn affirmation, then every such person Penalty. nding shall forfeit and pay a sum not exceeding forty s, to be ordered, levied and paid in such manner and h means, and with such power of commitment as is before directed as to such order and judgment to be between the party or parties in the original complaint. ing so far as regards the form of the order and hereinrovided for.

And be it further enacted, that it shall be lawful for If complaint ur ustice, if he shall find that the complaint of the party founded, justic ies aggrieved is not well founded, to order and adjudge may give costs ot exceeding twenty shillings, to be paid to the parties plained against ined against, which order shall be carried into effect. vied and paid in such manner, and with like power of tment as is hereinbefore directed as to the order and ent founded on such original complaint : provided No judgment to , that nothing herein contained shall empower such be given agains to make any order or judgment against the landlord any landlord, unless he perose benefit any such distress shall have been made, un- sonally levies ch landlord shall have personally levied such distress; the distress. ed always, that no person or persons who shall be ed by any distress for rent, or by any proceedings had course thereof, or by any costs and charges levied upon n respect of the same, shall be barred from any legal or Parties not to uit or remedy which he, she, or they might have had be barred of the passing of this act, excepting so far as any commedies.

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plaint to be preferred by virtue of this act shall have been determined by the order and judgment of the justices before whom it shall have been heard and determined, and which order and judgment shall and may be given in evidence, under the plea of the general issue, in all cases where the matter of such complaint shall be made the subject of any action.

Signature of of judgment.

V. And be it further enacted, that such orders and judgjustice, proof the ments on such complaints, shall be made in the form in the schedule hereunto annexed, and may be proved before any court, by proof of the signature of the justice to such order and judgment; and such orders as regard persons who may have been summoned as witnesses, shall be made in such form as to such justice shall seem most fit and convenient.

Brokers to give copies of their charges to the persons distrained.

VI. And be it further enacted, that every broker or other person who shall make and levy any distress whatsoever, shall give a copy of his charges, and of all the costs and charges of any distress whatsoever, signed by him, to the person or persons on whose goods and chattels any distress shall be levied, although the amount of the rent demanded shall exceed the sum of twenty pounds.

Printed copy of act to be hung un in sessions. house.

VII. And be it further enacted, that a fair printed copy of this act shall be hung up in some convenient place in such halls or rooms where the justices of each and every county in England and Wales shall hold either their quarter or other sessions.

SCHEDULE referred to in this Act :-

Form of the order and judgment of the justices before whom complaint is preferred, where the order and judgment is for the complainant.

In the matter of the complaint of A. B. against C. D., for a breach of the provisions of an act of the fifty-seventh year of His late Majesty King George the Third, intituled an act, (here insert the title of this act), I, E.F., a justice of the peace for the county of _____, and acting within the division -, do order and adjudge the said C. D. shall pay to the said A. B. the sum of ----, as a compensation and satisfaction for unlawful charges and costs, levied and taken from the said A. B. under a distress for rent; and the further sum of ——, for costs of this complaint.

(Signed) E. F.

Form of the order and judgment of the justice, where he dismisses the complaint as unfounded, and with or without costs, as the case may be.

In the matter of the complaint of A. B. against C. D., for the breach of the provisions of an act of the fifty-seventh year of His Majesty King George the Third, intituled an act, (here usert the title of this act), I, E. F., a justice of the peace, for ne county of _____, and acting within the division of -, do order and adjudge that the complaint of the said . B., is unfounded, (if costs are given), and I do further orar and adjudge, that the said A. B. shall pay unto the said . D. the sum of ——, for costs.

(Signed) E. F.

SCHEDULE of the limitation of costs and charges on disesses for small rents:-

	£	8.	d.
Levying distress	0	3	0
Man in possession, per day	0	2	6
Appraisement, whether by one broker, or more,			
sixpence in the pound on the value of the goods			
Stamp, the lawful amount thereof			
All expences of advertisement, if any such	0	10	0
Catalogues, sale, and commission, and delivery of		- •	-
goods, one shilling in the pound on the net pro-			
duce of the sale			

6 GEO. IV. CAP. 16.

An act to amend the laws relating to bankrupts.

LXXIV. And be it enacted, that no distress for rent made Distress not to id levied after an act of bankruptcy upon the goods or fects of any bankrupt, (whether before or after the issuing year's rent, the the commission), shall be available for more than one year's landlord to nt, accrued prior to the date of the commission; but the prove for the ndlord or party to whom the rent shall be due, shall be residue. lowed to come in as a creditor, under the commission for e overplus of the rent due, and for which the distress shall ot be available.

3 & 4 WILL, IV, CAP, 27.

n act for the limitations of actions and suits relating to real property, and for simplifying the remedies for trying the rights thereto.

II. And be it further enacted, that after the thirty-first day No land or rent December, one thousand eight hundred and thirty three, to be recovered person shall make an entry or distress, or bring an action but within recover any land or rent but within twenty years next after twenty years after the right of ie time at which the right to make such entry or distress, action or disto bring such action, shall have first accrued to some per- tress accrued n through whom he claims; or if such right shall have to the claimant crued to any person through whom he claims, then within whose estate he venty years next after the time at which the right to make claims. ich entry or distress, or to bring such action shall have first crued to the person making or bringing the same.

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No arrears of rent or interest to be recovered for more than six years.

XLII. And be it further enacted, that after the said thirty-first day of December, one thousand eight hundred and thirty three, no arrears of rent or of interest, in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent: provided nevertheless, that where any prior mortgagee or other incumbrancer shall have been in possesion of any land, or in the receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance, may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years.

3 & 4 WILL. IV. CAP. 42.

An act for the further amendment of the law, and the better advancement of justice.

Executor of lessor, may distrain for rent in his lifetime.

XXXVII. And be it further enacted, that it shall be lawful for the executors or administrators of any lessor or landlord, to distrain upon the lands demised for any term, or at will, for the arrearages of rent due to such lessor or landlord in his lifetime, in like manner as such lessor or landlord might have done in his lifetime.

Arrears may be distrained for, within six months after determination of term.

XXXVIII. And be it further enacted, that such arrearages may be distrained for after the end or determination of such term or lease, at will, in the same manner, as if such term or lease had not been ended or determined; provided that such distress be made within the space of six calendar months after the determination of such term or lease, and during the continuance of the possession of the tenant from whom such arrears became due; provided also, that all and every the powers and provisions in the several statutes made relating to distresses for rent, shall be applicable to the distress so made as aforesaid.

5 & 6 WILL. IV. CAP. 59.

An act to consolidate and amend the several laws relating to the cruel and improper treatment of animals, and the mischiefs arising from the driving of cattle, and to make other provisions in regard thereto.

Parties im-

IV. "And whereas great cruelties are practised by reason of pounding cattle keeping and detaining horses, asses, and other cattle and aninals impounded and confined without food, frequently for to provide su nany days;" for remedy whereof, be it enacted, that from cient food for them. nd after the passing of this act, every person who shall imound or confine, or cause to be impounded or confined any orse, ass, or other cattle or animal in any common pound, pen pound, or close pound, or in any inclosed place, shall nd is hereby required to find, provide, and supply such horse, ss, and other cattle and animal so impounded or confined, aily with good and sufficient food and nourishment for so ong a time as such horse, ass, or other cattle or animal shall emain and continue so impounded or confined as aforesaid; nd every such person who shall so find, provide, and supply ny such horse, ass, or other cattle or animal, with such daily ood and nourishment as aforesaid, shall and may, and he and Remedy for t hey are hereby authorized and impowered to recover of and recovery thereof. rom the owner or owners of such cattle or animal, not exeeding double the full value of the food and nourishment so upplied to such cattle or animal as aforesaid, by proceeding efore any one justice of the peace, within whose jurisdiction uch cattle or animal shall have been so impounded and suplied with food as aforesaid, in like manner as any penalty or orfeiture, or any damage or injury, may be recovered under nd by virtue of any of the powers or authorities in this act ontained, and which value of the food and nourishment so o be supplied as aforesaid, such justice is hereby fully authoized and empowered to ascertain, determine, and enforce as foresaid; and every person who shall have so supplied such ood and nourishment as aforesaid, shall be at liberty, if he hall so think fit, instead of proceeding for the recovery of the alue thereof as last aforesaid, after the expiration of seven lear days from the time of impounding the same, to sell any uch horse, ass, or other cattle or animal, openly at any public narket. (after having given three days' public printed notice hereof), for the most money that can be got for the same, nd to apply the produce in discharge of the value of such ood and nourishment so supplied as aforesaid, and the exences of and attending such sale, rendering the overplus (if ny), to the owner of such cattle or animal.

V. And be it further enacted, that in case any horse, ass, Persons may or other cattle or animal, shall at any time so remain im-enter pounds ounded or confined as aforesaid, without sufficient daily food the purpose of nd nourishment more than twenty-four hours, it shall and feeding cattle nay be lawful to and for any person or persons whomsoever, rom time to time, and as often as shall be necessary, to enter nto and upon any such common pound, open pound, or close ound, or other inclosed place in which any such cattle or nimals shall be so impounded or confined, and to supply such attle or animal with such good and sufficient food and nourishnent, during so long a time as such cattle or animals shall so emain and continue impounded or confined as aforesaid, without being liable to any action of trespass or other proceeding

by any person or persons whomsoever, for or by any reason of such entry or entries for the purposes aforesaid.

enalty on paries neglecting o feed imounded cattle. VI. And be it further enacted, that in case any such person who shall so impound or confine, or cause to be impounded or confined, any such horse, ass, or other cattle or animal as aforesaid, shall refuse or neglect to find, provide, and supply such daily good and sufficient food and nourishment to such cattle and animal so impounded or confined as aforesaid, he and they shall, for every day during which he or they shall so refuse or neglect to find, provide, and supply the same as aforesaid, forfeit and pay the sum of five shillings; which last sum or sums of money shall and may be recoverable, by proceeding before any one justice of the peace, in like manner as hereinbefore provided for the recovery of any penalty, forfeiture, damage, or injury as hereinbefore mentioned.

imitation of

XIX. And be it further enacted, that all actions and prosecutions which may be brought or commenced against any person, for any thing done in pursuance, or under the authority of this act, shall be commenced within one calendar month next after the fact committed, and not afterwards, and shall be brought and tried in the county or place where the cause of action shall arise, and not elsewhere; and notice in writing of any such action, and specifying the cause thereof, shall be given to the defendant, fourteen clear days before the commencement of any action; and the defendant in such action may plead the general issue, and give this act or any other matter or thing in evidence at any trial to be had thereupon; and if the cause of action shall appear to arise from, or in respect of any matter or thing done in pursuance and by the authority of this act, or if any such action shall be brought after the expiration of one calendar month, or shall be brought in any other county or place than as aforesaid, or if notice of such action shall not have been given in manner aforesaid, or if tender of sufficient amends shall have been made before such action commenced, or if a sufficient sum of money shall have been paid into court after such action commenced, by or on behalf of the defendant, the jury shall find a verdict for the defendants; and if a verdict shall pass for the defendant, or if the plaintiff shall become nonsuit, or shall discontinue any such action, or if, on demurrer or otherwise, judgment shall be given against him, the defendant shall recover his full costs as between attorney and client, and shall have the like remedy for the same, as every defendant may have for costs of suit in other cases at law; and although a verdict shall be given for the plaintiff in any such action, such plaintiff shall not have costs against the defendant, unless the judge before whom the trial shall be had, shall certify his approbation of the action and of the verdict obtained thereon.

6 & 7 WILL. IV. CAP. 71.

An act for the commutation or tithes in England and Wales.

[Such parts of this act, as well as of the amendment acts, which relate to the law of distress, have been fully given in the text. See p. 218, et seq.]

1 & 2 VICT, CAP, 110.

An act for abolishing arrest on mesne process in civil actions, except in certain cases; for extending the remedies of creditors against the property of debtors, and for amending the laws for the relief of insolvent debtors in England.

LVIII. And be it enacted, that no distress or distresses for Landlord may rent made and levied after the arrest or other commencement distrain for one of the imprisonment of any person whose estate shall, by any year's rent only. such order as aforesaid, have been vested in the provisional assignee, upon the goods or effects of any such person, shall be available for more than one year's rent accrued prior to the making of such order, but that the landlord or party to whom the rent shall be due, shall and may be a creditor for the overplus of the rent due, and for which the distress shall not be available, and entitled to all the provisions made for creditors by this act.

APPENDIX (A).

Additional note to p. 54, n. 4.

The first case on this point is that of ______v. Cooper, 2 Wils. 375, which appears to have been recognized by all the subsequent cases bearing on the subject, without any emmination of the grounds of the decision, or the correctness of the report. Some few text-writers have ventured to look upon it with suspicion: and as its authority has been recently questioned by the learned judges, in the Exchequer Chamberin Ireland, in the case of Pluck v. Digges, 2 Hud. & Bro. 1, it may not be improper to give the point some present consideration.

The question stated to have been proposed to the court in Cooper's case is, whether on an assignment by a lessee for years of his whole term, without a clause of distress, he could distrain for rent in arrear, as for rent-seck under the 4 Geo. 2, c. 28; and the court is reported to have said, "there is no such thing as a rent-seck, rent-service, or rent-charge, issuing out of a term for years. Bro. Dette, pl. 39, cites 43 Edw. 3, 4, (erroneously given by the reporter for E. 45 Edw. 3, 8. pl. 10.) "Per Fynchden, C. J., If a man hath a term for years, and grants all his estate of the term rendering certain rent, he cannot distrain if the rent be in arrear; this case is law, and in point." Now, if such were indeed the expressions and decision of the court, it is much to be regretted that we have not a more satisfactory report of the reasons upon which the judgment was given. The position attributed to the court is not at all borne out by the passages referred to in Bro. Abr., and the Year Book there cited. What is said by Fynchden, C.J., is merely this, " If I have only a term for years, and let to you all my estate of the term, rendering me a certain rent, I believe that I cannot distrain if the rent should be in arrear, and for that alone the Year Book is cited by Brooke. The proposition is not necessarily made to depend on the interest being for years, but upon the fact that all the interest was granted, and no reversion left, (per Bushe, C. J., in Pluck v. Digges, 2 Hud. & Bro. 95,) which in Fynchden's time, would have prevented a distress, supposing none to have been charged by deed, as well upon the absolute conveyance of a fee, as on the assignment of a term of years. There is no doubt but Fynchden's proposition was good law in his time; but it is difficult to see its applicability to a case occurring subsequently to 4 Geo. 2, c. 28.

It is not made to appear, that anciently at common law there was any such rule as that stated in Cooper's case, or any reason for such a rule. On the contrary, the rule at common law was, that a rent might issue out of any lands or tenements corporeal, out of whatever was manurable, and whereupon the lord might enter to take a distress, Co. Lit. 47 a., 142 a.; Butt's case, 7 Rep. 23: Gilb. Rent, 26. There is no evidence of any distinction as to the amount of the distrainer's interest, in that out of which the reservation or grant was made, whether he was tenant in fee, in tail, or by the curtesy, &c., Newcomb v. Harvey, Carth. 161; nor are there any positive traces, up to the time of the case in Wilson, of such a distinction existing between the several kinds of rents, as that either of them could not issue from the same source as the others. It seems, that out of whatever interest in a manurable tenement a rent generally could issue, it might be reserved as rent-service, or granted or reserved as rent-charge, or rent-seck, being capable equally of all the modifications known to the law. (Sed vide 1 Byth. Conv. by Jarm. 623; ante p. 29, n. 7; Burton's Comp. 2nd ed. 343.)

That it was very anciently held, that a rent-service might issue out of a term of years, is evident from the year book, 2 Edw. 4, 11 pl. 2. In that case, a termor for eighty years subdemised for fifteen years, reserving rent, and distrained for that rent; Littleton, who was counsel in the cause, said, "it seems that he cannot distrain, on account of this reversion, for he has no reversion except the reversion of a chattel;" but Moile, J., answered him, "it is well enough, but if he had granted him all his term, rendering rent, it would be otherwise." For in that case, it would have been reduced to a rent-seck, for which at common law, and at that period, there was no distress. In accordance with this, it has always been allowed, except in the case in Wilson, that if a lessee for years grant under-leases for any period less than his own interest, though only by a day, he has a power of distress without reservation by virtue of his reversion, Wade v. Marsh, Latch. 211; 1 Rob. Rep. 387, and the cases cited; and see p. 54, n. 4; for such rent is a rent-service. That a rent-charge may be granted or reserved out of a term of years, or on an assignment of a term, is evident from Butt's case, 7 Rep. 23; Co. Lit. 147, b.; Plowd. 524, b.; Bulst. 3 Parl. 121, 122, 433, 125; Hutton, 114; Mounson v. Redshaw, 1 Saund. 187; Saffery v. Elgood, 1 R. & E. 191.

Now, when it is remembered, that a rent-seck is in effect nothing more than a rent reserved, like a rent-service, but without any reversion, or granted by deed, like a rent-charge, but without any clause of distress, Blac. Com. n. 2, p. 42; Lib. sec. 217, 218; it is difficult to conceive, (supposing the report to be correct,) upon what grounds the court in Cooper's case came to the conclusion that that reservation was not a rent-seck, and distrainable under 4 Geo. 2, c. 28. It is clear,

that the report is not a correct statement of the law as to rent-service; and if the other part be correct, it follows that what is certainly a good rent-service, when reserved to a reversioner, is no rent at all, if the reversion be granted away reserving it, or if it be reserved without any reversion. The same observation applies to rent-charge.

Some learned text-writers have endeavoured to understand the case on the broad and literal ground, "that there is no such thing as a rent-seck issuing out of a term for years." I Byth. Conv. by Jarm. 623; ante p. 29, n. 7; Burton's Comp. 2nd ed. 343. But this doctrine does not appear to rest on any satisfactory authority prior to the case itself.

In Pluck v. Digges, 2 Hud. & Bro. 86, Lord Plunket said, that he did not feel the force of the arrangement used in Cooper's case, (or that in Parmenter v. Webber,) to show that the rent was not a rent-seck, and that it is not easy to reconcile that argument with the decision in Newcomb v. Harvey, Carth. 161, and a great variety of other cases to the same effect; Poultney v. Holmes, 1 Stra. 405; Floyd v. Langfeld, Freeman's Rep. c. 225; S. C. Lloyd v. Langford, 2 Mod. 174; Cartright v. Pingree, Freeman's Rep. c. 520; S. C. 1 Vent. 272; 2 Lev. 80; 1 Vent. 242; in which cases, such a reservation on an absolute assignment was held to be a rent. In the same case, (Pluck v. Digges,) Bushe, C. J., animadvertei upon Cooper's case, as imperfectly, and probably inaccurately reported. He endeavoured to suppose that the reservation of the rent was not by indenture; in which case he said, the decision must be simply this—that the avowant could not distrain as for a rent-charge, there being no clause of distress; nor for a rent-seck, there being no reservation by indenture; nor for rent-service, there being no reversion to which it could be incident. But supposing the assignment to have been by indenture, (and that fact seems sufficiently apparent from the report; and see per Dallas, C. J., in Parmenter v. Webber,) the same learned judge said, that the rent reserved would have been a rent-seck, which could have been distrained for under 4 Geo. 2, c. 28, and that the language of the court would in his opinion be clearly wrong. It has been suggested by the learned editor of Freeman's Rep. (ed. 1826,) that probably the party distraining avowed shortly as for rent-service in the form prescribed by 11 Geo. 2, c. 19, and was therefore precluded from insisting that the reservation took effect as a rent-seck. But this suggestion does not account for the expressions of the court, or the professed grounds of the decision; nor, in fact, has the point expressly stated for decision any reference to such a question.

As to the subsequent cases bearing upon the point, there are in all some material diversities from the case in Wilson.

In Smith v. Mapleback, 1 T. R. 445, there was a surrender of the term to the original lesson; so that no interest remained out of which a rent of any kind could issue; it was

tinguished, and the agreement was for the payment of a m in gross annually, partly in consideration, or by way of rchase of the surrender, and partly for the goodwill of the emises; Cooper's case was not even referred to.

In Parmenter v. Webber, 8 Taunt. 593; S. C. 2 Moore, 6, there was merely a parol agreement; though this case s certainly decided on the grounds of its operation as an solute assignment, and altogether on the authority of -

Also in Preece v. Corrie, 5 Bing. 24; S. C. 2 Moore & P. re was nothing more than a parol agreement; but this case. e the last, was decided on the ground of the distrainer hav-

; parted with his whose interest.

The case of Pluck v. Digges, (in error,) 5 Bligh. N. S. 31; C. 2 Dow. & C. 180, which has been frequently cited as ng to the same effect, was decided on wholly other grounds; mely, that where there is no reversion, and consequently relation of landlord and tenant, there is no rent of the scription, to which the provisions of the Irish statute 25 o. 2, c. 13, (following the English statute, 11 Geo. 2, c. ,) giving the general avowry, apply.

On the subject of rents reserved on assignments, or sur-

iders, see the following additional authorities, Warner v. us, Godb. 146; Noy, 109; Trevil v. Ingram, 2 Mod. 282; nn v. Hanson, 1 Lev. 100; Spatchurst v. Minns, Aleyn, -8; Bland v. Inman, Cro. Car. 288; Palmer v. Edwards, ug. 186; 19 Viner, 112, 115; Gilb. on Debt, p. 385-6. . the difference between rents and sums in gross, see 18 ner. 490.



ADDENDA ET CORRIGENDA.

Page 32. Last line, for "tortuously" read "tortiously."

Page 35. Note 4, for "tortuously" read "torti-

ously."

Page 40. Add—A rent-charge may be divided by will or by deed operating under the statute of uses, so as to make the tenant liable, without attornment, to several distresses by the devisees or cestuis que use. Rivis v. Watson, 5 M. & W. 255.

And semble, since the statute 4 Anne, c. 16, a rent-charge may be so divided by a conveyance of any kind. *Id*.

Page 45. Line 4 from the bottom, for "tortuous" read "tortious."

Page 47. Line 5, for "tortuous" read "tortious." Page 49. Add—By the statute 1 & 2 Geo. 4, c. 23, it is provided, that it shall be lawful for persons to whom any allotments of land have been set out or allotted under any inclosure acts, and to whom possession of such allotments has been given, and who have demised the same or any part thereof, or for their bailiffs or agents, or any persons by them authorized or employed for that purpose, to enter into and upon such allotments, and seize and distrain any goods, chattels, or effects, &c., for rent in arrear and unpaid, notwithstanding the commissioners' award shall not have been executed and perfected.

Page 68. Add—That an executor may authorize a distress before probate, see *Whitehead* v. *Taylor*, 10 A. & E. 210; s. c. 2 P. & D. 367.

Page 79. Title of sect. 2, for "Of persons whose goods are liable to, or exempted from, a distress for rent," read "Of persons on whose possession a distress for rent may be made, and whose goods are liable thereto, or exempted therefrom."

Page 81. Line 11 from the bottom, for "who are in the above grant" read "who are in above the grant."

Page 83. One line from the bottom, for "statutes" read "statute."

Page 92. Add—It was also ruled in another instance, that the principle of this exception is not applicable to the case of a horse which is merely led at the time. Wagstaffe v. Clarke, Camb. Sum. Ass. 1826. But in a recent case, it was held upon demurrer, that a horse, a set of harness, a prong, and a shovel, could not be distrained, whilst, according to the terms of the averment, they were in a man's "actual possession, under his personal care, and being actually used by him." Field v. Adames, Q. B. Michaelmas T. 1840; post, p. 233.

Page 98. Add—A brewer's barrels delivered to a publican with beer, and remaining on the publican's premises, are liable to be distrained for rent. *Joule* v. *Jackson*, 7 M. & W. 450.

Page 117. Note 8, add—see some observations on a distress for more rent than was due, post, p. 203, 204, 205; but see also the late case of Taylor v. Henniker, 4 P. & D. 242.

Page 130. Note 6, add—and see post, p. 197.

Page 130. Add—Where a distress was made by command and in the name of a landlord, but he died before the distress was actually made, it was held that the bailiff might make cognizance as the bailiff of his executrix (under 32 Hen. 8, c. 37), who ratified the distress, although before probate. Whitehead v. Taylor, 10 A. & E. 210; s. c. 2 P. & D. 367.

Page 131. Add—In a late case, the defendant, an attorney, employed the plaintiffs to levy a distress for rent on the premises of an auctioneer, urging them to make the levy forthwith, assigning as a reason, that

there was a large quantity of furniture in the auction-room; and by the warrant of distress, he directed them to distrain "the several goods and chattels on the premises." Acting on these instructions, the plaintiffs caused all the goods on the premises to be seized. Some of the goods so seized turned out to be privileged from distress; the owners brought actions; eventually the goods were restored to them; and the plaintiffs incurred costs. Under these circumstances, it was held that an indemnification of the plaintiffs against the consequences of pursuing the defendant's instructions was implied by law. Toplis v. Grane, 7 Sc. 620.

Query, whether a broker who enters under an ordinary warrant of distress, and takes goods upon the premises that are privileged by law from distress, can look for indemnity from his employer? Semble, not. *Id*.

It is submitted that there cannot exist any reasonable doubt upon the latter point.

Page 132. Note 2, add—and see post, p. 186,187. Page 133. Line 5 from the bottom, see the Addenda to page 200, infra.

Page 138. Note 5, for "Groves v. D'Acastro" read "Greaves v. D'Acastro."

Page 143. Line 24, add—or he may reimburse himself by sale of the cattle; see post, p. 152, 153. The obligation to supply food does not appear to apply to the pound-keeper, Mason v. Newland, 9 C. & P. 575. It has been thought to exclude any right in the owner of the cattle to supply them with food himself. Id.

Page 143. Note 8, add—but they cannot recover any compensation. *Mason* v. *Newland*, 9 C. & P. 575.

Page 153. Line 10 add note, Mason v. Newland, 9 C. & P. 575.

Page 157. Note 3.—This has since been expressly decided in the late case of *Allen* v. *Flicker*, 10 A. & E. 640. Lord *Denman*, C. J., said, "It is clear to me that the act 2 Will. & M. c. 5, is in full force. The

schedule of 57 Geo. 3, c. 93, probably refers to the employment of a single broker by consent: but, at all events, it is too loosely worded to operate as a repeal of the former act."

Page 161. Note 8, for "Pointer v. Buckley," read "Poynter v. Buckley."

Page 165. Line 5, add—The correctness of this charge for poundage on the levy is, however, open to considerable doubt. In Hills v. Street, 5 Bing. 37, the broker's charges were 81. 5s. as broker's commission on a distress for 230l. 10s. (at the rate of 5l. for the first 100l., and 2l. 10s. for every hundred over); and Best, C. J., said, that the prothonotary had stated to the court that, on taxation of costs, the broker's cost for distraining would not be permitted to exceed one guinea. In a very recent case the broker (the defendant) had levied for 1461. arrears of rent; the things seized were appraised at 681., but were sold for only 38l. From the latter sum he deducted, amongst other charges (the whole amounting to upwards of 22l.) 6l. 2s. for commission on the amount of the levy. On the trial his witnesses swore that the charge for commission was customary with the trade; that the usual practice was to charge 5 per cent. on the first 100l. and $2\frac{1}{3}$ per cent. on the the second 100l.; and that the charge was made on the amount of the levy, not of the sale. The witnesses for the landlord (the plaintiff) swore that the charge for commission was not recognised by the trade; and that the usual charge for making the levy was one or two guineas, according to circumstances. In summing up, Gurney, B., said, that this was the first case in which he had heard this charge for the levy set up. That the law knew no such principle as this charge of commission, unless sanctioned by the custom of trade. That in some instances commission might be the only practicable mode of remuneration; and that if it were a general rule or custom, the law would act upon it. But that in such case it would be one known to all mankind liable to be affected by it: and that if there were no rule or custom of this

nature, the distrainer could only be entitled to a fair and reasonable remuneration. That this charge for commission appeared to him to be based on the most monstrous principle. That it had been proved that a fair and reasonable charge for merely making the levy was usually considered to be one or two guineas, dependant, of course, on the peculiar nature of the trouble which such levy induced on the party. That he must say he thought such a method of charge fair and reasonable, whilst the plan of charging a commission, and that, too, not on the amount realized by the sale, but on the full amount of the arrears, he could not but regard as highly dangerous, and as one that ought on no account to be sanctioned by any court. And that if the jury entertained the same views, they would find a verdict for the plaintiff.— Verdict for the plaintiff accordingly. Smith v. Livermore, Exch. Sit. in E. T. 1841.

Page 176. Note 7, add—Ladd v. Thomas, 4 P. & D. 9.

Page 180. Note 6, for "Frith v. Purvis," read "Firth v. Purvis."

Page 194. Note 8, for "Herbert v. Yolland," read "Jenner v. Yolland."

Page 200. Add—The person on whom an excessive distress is made must be careful how he enters into any agreement with the distrainer; for an agreement entered into under a duress of goods is not Therefore, in a late case, where, to debt on an agreement to pay 191. 10s., the defendant pleaded that just before the making of the agreement the plaintiff had wrongfully distrained goods of the value of 20% under colour of a distress for 19%. 10s., whereas only 31. 7s. 6d. was due, and that the plaintiff threatened to sell the goods, unless the defendant made the agreement; and the defendant, in order to prevent the sale, entered into the agreement in question: it was held that the plea was bad, and judgment was given for the plaintiff, non ohs. vered. It was held, also, that the withdrawal of the distress was a good consideration for the defendant's agreement. Skeate v. Beale, 3 P. & D. 597.

Page 205. Add—In a subsequent and very recent case, however, the doctrine laid down in Wilkinson v. Terry, and Avenell v. Croker, and advocated above, has been over-ruled by the court of Queen's Bench. It was there held, that an action on the case at common law lies for distraining for more rent than is due, although the distress taken is not sufficient to pay the actual arrears. Taylor v. Henniker, 4 P. & D. 242. And that it lies although a notice of distress for more rent than is due is withdrawn, and the sale takes place under a second notice for the amount really due. Id.

It does not appear to have been noticed in the case that any mention, at the time of distraining, of the amount for which the distress is made, is altogether unnecessary. It may also be observed that in other instances where an action is maintainable in respect of mere "legal damage," as it is here termed, or without evidence of actual damage, actual damage is always certainly possible; and it is because the actual damage is so certainly possible, that the law is content to see the effect in the cause. But here it is not easy to discover even a possibility of damage. suggestion that the party distrained upon might, in consequence of the excess, be unable to get sureties for a replevin bond, is answered by the fact that the amount of the bond depends, not upon the arrears of rent claimed, but upon the value of the goods taken.

Page 241, add—To trover for a reclaimed deer, the defendant pleaded, that he took it damage feasant in his own close as a distress, which was the conversion complained of. Held, that the plea confessed and avoided a conversion, and that it was not necessary for the defendant to add that he had impounded the deer, or in what manner he had disposed of it; and that if there was any irregularity in disposing of the distress, it should have been newly assigned. Weeding v. Aldritch, 9 A. & E. 861; s. c. 1 P. & D. 657.

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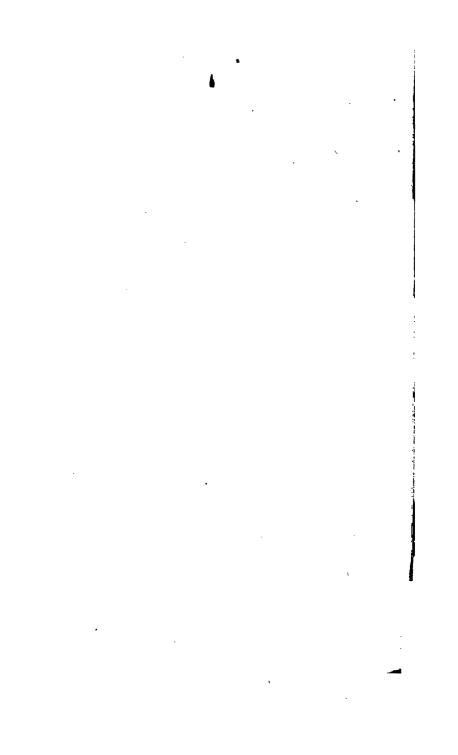
by action, 239.

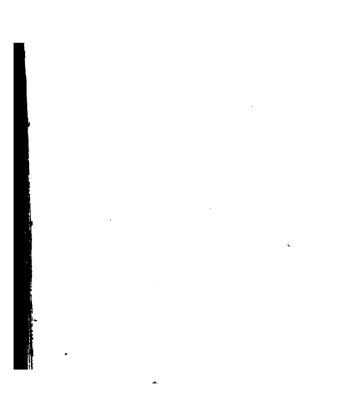
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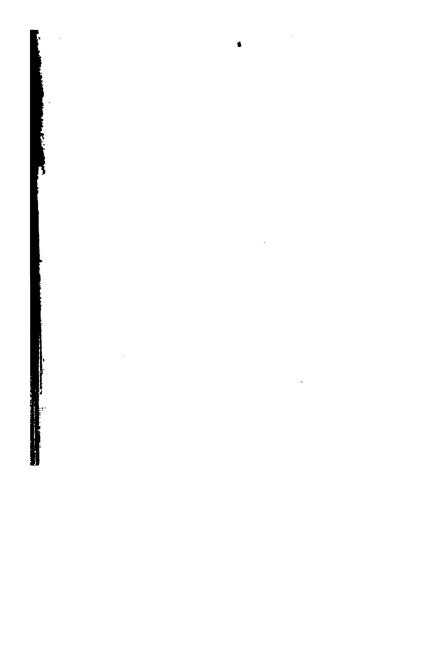
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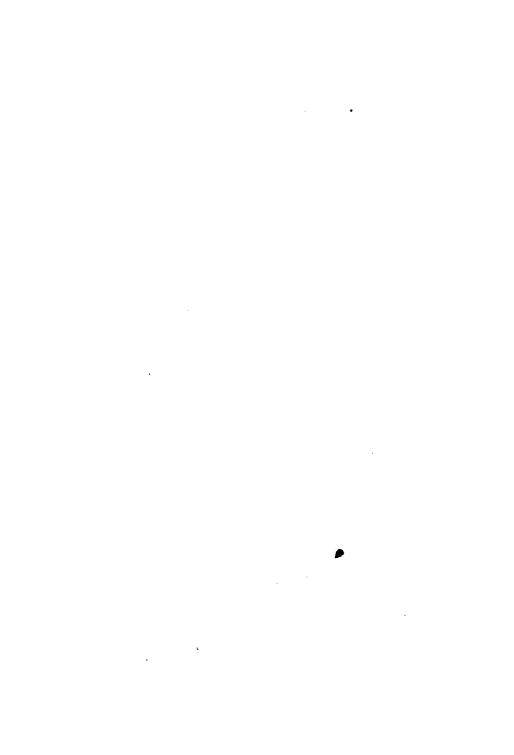
THE END.





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